SUPREME COURT
UNITED STATES.

Leavenworth, L. and G. R. R.
vs.
The United States.
No. 676.

Missouri, K. and T. R. R.
vs.
The United States.
No. 763.

IN THE MATTER OF OSAGE INDIAN CEDED LANDS.

BRIEF OF P. PHILLIPS,
Of Counsel for Appellants.

WASHINGTON:
S. & R. O. POLKINHORN, PRINTERS
1875.

Supreme Court United States.

THE LEAVENWORTH L. & G. R. R. CO.
v.
THE UNITED STATES. } No. 676.

BRIEF OF P. PHILLIPS.

FOR APPELLANTS.

The bill in this case was filed in the Circuit Court of the United States for the District of Kansas, by the District Attorney, in the name of the United States against the appellant.

It charges that the defendant claims to hold the lands therein described, under the act of March 3, 1863, and 24 July, 1866, granting lands to the State of Kansas, and derives title under an act of Kansas, 9 February, 1864, and by virtue of certain patents and certified lists furnished by the Secretary of the Interior.

It is averred that the lands were Indian lands, and were not included in the grant to the State.

It is further averred, that the roads for which the grant to the State was made have not been constructed, and that the lines of the road mentioned therein, have not been completed within ten years, as the act required.

That on the 19 March, 1863, the Sec'y of the Interior withdrew from market the lands on the line of this road,

embracing the odd sections, for ten miles on each side, extending from Leavenworth south, to the north boundary of the then Osage lands herein described, and that neither the State nor the defendant made any claim to said Osage lands.

That the line of defendant's road was definitely fixed long before the 21 January, 1867.

That no part of the lands granted by the act of 1863, and by the legislature of the State in 1864, were applied by the State to the construction of defendant's road, as provided in the 4 section of the act of 1863.

That the Governor of the State never certified that any section of 20 miles was completed.

That he never sold a single acre of land embraced in the act of 1863, and never applied any proceeds of such land to aid in the construction of the road.

That he never certified that the whole of the road had been completed, and that the only certificate made by him to the Secretary of the Interior, was one dated 21 September, 1871, which is set forth at large, at p. 4.

That on the receipt of this certificate, the Secretary certified to the Governor a list of the odd sections, as shown by the map mentioned in said certificate, and thereupon the Governor issued patents to the defendant, filed as Exhibits A, B, C, D, E.

That the certificate and the patents for lands within the limits of the tract described in the first article of the treaty with the Osage Indians, proclaimed 21st January, 1867, constitute a cloud on the legal title of complainant which should be removed.

The prayer is that the court may decree that the legal title to the lands embraced in the treaty is vested in the complainant, in trust for the purposes therein described,

and that the defendant be perpetually enjoined from setting up the title.

The answer admits the occupancy of the lands by the Osage Indians up to the treaty of 29th September, 1867, and insists that the interest acquired by complainant under it, enured to the benefit of defendant.

It insists that by the terms of the act of 1863, it did not become operative to pass the title to the lands until the line of the road was definitely fixed and located.

It sets forth the acceptance of the grant by the State, and its conveyance to the defendant in consideration of the construction of the road, patents to issue as fast as defendant should finish any twenty consecutive miles.

That the defendant accepted said conveyance, and before the 3d March, 1872, completed the road as required by the provisions of the act of Congress, and the act of the State, a distance of about one hundred and fifty miles.

That in the month of November, 1867, and not before it made an actual survey on the ground and fixed the line of the route, and on the 7th December, 1867, the map of location and survey was filed with the Governor of the State, and on the 2d January, 1868, a like map was filed with the Commissioner of the General Land Office.

That on the 21st January, 1868, the Secretary of the Interior withdrew the lands from entry and sale, and directed the Register and Receiver to withdraw the lands, together with the other odd sectioned lands lying within ten miles of the line so definitely fixed.

That immediately after the location of the line it proceeded to build the road, and before the 1st of October, 1871, thereupon after inspection, the Governor certified

the same to the Secretary of the Interior, who being satisfied therewith certified to the Governor the lands the State was entitled to under the act of Congress, as shown by Ex. A.

That for the lands so certified, the State issued patents to the defendant, and thenceforward levied taxes on the same, which taxes for the year 1871, alone amounted to $50,000, which was paid by defendant.

That when the defendant had built its road within said tract as far as the town of Thayer, Congress, by the act 19 April, 1871, acknowledged the validity of said grant and authorized a relocation of the road south of said town and within the limits of the grant.

That after the treaty made with the Osages, and before proclamation, it was so amended as to recognize and confirm the grant of the lands so certified to the State, and so amended, the treaty was proclaimed on 21 January, 1867.

That after the grant of said lands to defendant, the Company being largely indebted for the building of the road, mortgaged the same to the Farmers' Loan and Trust Company to secure its bonds to the amount of five millions of dollars, and that the said bonds were negotiated by said Company to other persons who purchased on the faith of the several acts herein recited.

That none of the matter contained in the bill entitled the complainant to relief in equity, and defendant asks to have the same benefit of defense as if it had *demurred* to the bill.

An answer was also filed by the Farmers' Loan and Trust Company, by consent. p. 63.

It sets up its mortgage, and avers that the great body

of the lands covered by the mortgage are those mentioned in the bill of complaint, and that the security of the mortgage is dependent on the validity of the title to the same.

It prays that the bill be dismissed, and for general relief.

Replications were filed to both answers.

A stipulation as to the use of certain evidence is to be found on p. 74.

At the June term, 1874, a decree was rendered for complainant, annulling the patent and all evidence of title issued by the United States to or for the benefit of defendant of the lands described in the bill.

From this decree the appeal is now taken.

A similar bill was filed against the Missouri, Kansas, and Texas Railroad.

The answer, in its essentials, is the same as that of the Leavenworth company.

It denies that any of the lands claimed in the bill have been sold by the Government to other parties.

It avers that its map of the line of road was filed with the Secretary after the 21 January, 1867, and on the 2 January, 1868, the Secretary withdrew the lands from market.

That on the 9 June, 1870, the Governor duly certified the completion of the road, and thereupon the Secretary issued patents to the defendant.

That the defendant being largely indebted for money

advanced in the construction of the road, mortgaged to the Union Trust Company of the city of New York the whole of the lands so patented to secure the bonds of the company amounting to fourteen millions of dollars.

ASSIGNMENT OF ERROR.

The decree is erroneous in holding that the acts of Congress did not confer a title on the State for the lands referred to in the bill and in decreeing the relief prayed for. The bill should have been dismissed.

CONSTRUCTION.

The decision of this cause depends upon the construction of the act granting lands to the State.

The rule strictly limiting the grant and resolving all doubt in favor of the government is announced by this court in the opinion of the majority in the Charles River Bridge Case.

The question being whether the State had perpetually excluded itself from granting the *franchise* of a bridge by reason of a prior grant for this purpose which contained no words limiting the power of the State.

The court held that such a grant should be construed strictly as against the grantee.

The cases cited in support of this decision are:

Beatty v. Knowles, 4 Pet. 168.

Bank v. Billings, 4 Pet. 514.

U. S. v. Arridondo, 6 Pet. 738.

On examination it will be found that the two first cases involved the question as to the relinquishment of the State power of *taxation.*

The last case was on a treaty in which the court holds—"that such construction must be reasonable, and such as will make the true intention of the King as expressed in the charter, take effect, *as this is for the King's honor, and stands with the rules of law.*"

The question now before the court does not involve the grant of any political right whatever. It neither concerns the power of taxation nor the exercise of any other governmental function.

It is simply a conveyance of property founded on a valuable consideration.

"Note (says Lord Coke) the gravity of the ancient sages of the law, to construe the King's grants *beneficially for his honor*, and not to make any strict or literal construction in subversion of such grants."

In a very thorough discussion of this subject by Judge Story he emphatically declares that this rule of strict construction never at any time was applied to Crown grants made for a *valuable consideration.*

In such grants the rule has always been the same as in cases between subjects.

They are liberally expounded, that the dignity and justice of the government may never be jeoparded by petty evasions and technical subtleties. 11 Pet. 589.

Grants for a consideration are in the nature of contracts, and it would be dishonorable in the government *to pocket the consideration and then quibble as to the obscurities and implications of its own contract.*

This subject, I believe, has never been seriously argued since this decision, but the court has in several cases applied certain general expressions found in the opinion

of the court, so as apparently to cover all grants made by Congress.

We respectfully call the attention of the court to the proper rule which should govern the case now before them.

The act grants lands to the State for the purpose of aiding the construction of a road through the public lands.

The power is conferred on Congress to make "rules and regulations respecting the territory or other property of the United States."

Under this power, the government, as a great landed proprietor, disposes of portions of its lands for such purposes as will enhance their value.

The construction of railroads has been deemed the best mode to accomplish this result. In granting a certain number of sections, the alternate sections are raised to double the price. But these roads also attract population, and as this increases, all the lands of the government influenced by their location, find a ready sale.

Here then is a most valuable consideration.

But independent of this, the act stipulates for the free transportation on the roads of the troops and property of the United States, and for the transportation of the mails on such terms as the grantor itself may direct.

Further than this, the grant is to the State, and is made for the purpose of enabling it to contract for the purpose of building the road. The persons thus contracted with, were not the solicitors for the passage of the act, and who are, in some of the opinions, held to be answerable for its terms, and responsible for any indistinctness in them.

The dealing, in the first instance, is clothed with the dignity of an agreement between two governments.

It however looks to a contract with individuals envolving millions of money.

The State enters into the contract on the faith of it; the State conveys the lands which it believes was granted to it by the act; the contractors accept the lands in the same faith; they borrow the necessary millions in this country and in Europe, on the security of a mortgage of these lands;—the officers of the government intrusted with the administration of our land system having previously ascertained what were the lands granted by the act and given the most solemn evidence of the fact by the certificate of the Secretary, and a patent signed by the President.

This is the condition of things in which the court is called on by a strict and technical, construction of the act to declare, that the lands thus used, were not covered by the act.

We do not object to the rule as laid down by the majority of the court in the Warren Bridge case, and as applied to the facts of that case, to wit: that when the claim is that the government has parted with any portion of its political power in favor of an individual or corporation, it must be shown beyond any doubt that the legislation has thus expressed itself.

The claim that a mere act incorporating a Bridge Company excluded the legislature from incorporating any other Company for the same purpose; the claim for the exemption from taxation—these and other of a like character, stand on a very different basis from an act granting a portion of the public lands, and should be treated by very different rules of interpretation.

Even in the case of grants without any direct consideration, this court in seeking to give effect to the intention of Congress in opposition to its express words, has gone so far as to declare that a provision giving

"320 acres to a single man, and 640 to a married man," embraced within its provision a *woman*.

Silver v. Ladd, 7 Wall., 226.

Where there is as, in this case, a consideration, and the act operates in the nature of a contract, no sufficient reason is apparent why the principles of good faith which require that the intention of the parties to an agreement should not prevail.

We maintain, then, on this point, the position of Judge Story is the correct one, and is fully sustained by ancient as well as modern authority.

The writers on elementary law, I believe, without exception, take the same view.

Kent states the doctrine thus: "If the royal grant is not a mere donation, but one founded on a valuable consideration, the stern rule never applies, and the grant is expounded as a private grant, favorable to the grantee, or rather, according to its fair meaning, for the grant is a *contract*." 1 Kent, marg. p. 460, N.

Parsons says: "It is just and reasonable that the construction should be favorable to the grantee in the case of a conveyance of lands by the sovereign for valuable consideration," but a different rule prevails where exclusive privileges are given.

2 Par. on Con. 18, N.

Washburn says: "Strictness of construction is not applicable when the grant is for a valuable consideration. In such case the rule between the government and the subject is the same as between grantors and grantees," and, he adds: "It may be stated as a general rule in respect to legislature grants in this country, that such grants should be construed liberally in favor of the grantees, and in such a manner as to give full and liberal operation so as to carry out the legislative intent when that can be ascertained." Washburn, 3 vol. marg. p. 524.

We need not multiply authority, which reaffirms the rule as stated by Chitty on Prerogatives, that "the King's grants on a valuable consideration, shall be construed *strictly for the patentee* for the honor of the King."

Chitty, Prerog. 394.

The most recent English case on the question of construction that is noteworthy is, that of the Lord Commissioners, in which it is held that "upon a question of the meaning of words the same rule of common sense and justice must apply, whether the subject matter of construction be a grant from the Crown or from a subject. It is always a question of intention, to be collected from the language used with reference to the surrounding circumstances."

12 Moore, P. C., 497.

This question was not for determination in the case of Rice v. Railroad Company, 1 Bl., for the court says, "admitting the rule of construction assumed by defendants that the grant must be construed most strongly against the grantor, we would still be constrained to hold that the proposition submitted by them cannot be sustained. p. 379.

Notwithstanding it was said, "Legislative grants undoubtedly must be interpreted if practicable so as to effect the intention of the grantor; but if the words are ambiguous the true rule of construction is the reverse of that assumed by the defendant, as it well recited by repeated decisions of the court."

Reference is made to the Warren Bridge case, *supra*.

Mills v. St. Clair Co., 8 How., 581.

Perrine v. Chesapeake, 9 How., 192.

Richmond v. St. Louis R. R., 13 How., 81.

Ohio Co. v. De Bolt, 16 How.. 435.

In Mills' case, the claim was for an exclusive ferry right, and it was held that "in such a grant if the meaning of the words be doubtful, they shall be taken most strongly for the grantor."

In Perrine's case, the claim was by a corporation to tax passengers passing through its canal, where the charter itself expressly defined the subjects on which it had the right to lay the tax.

It is here repeated that the rule in cases of *this description*, as is above stated: "The *rights of the public* are never presumed to be surrendered to a corporation, unless the intention to surrender clearly appears."

In the Richmond case, the railroad denied the power of the legislature to authorize the construction of another road, and the rule of ambiguity on the authority of the Warren Bridge case is again declared.

Three judges dissented—Curtis, McLean and Wayne. The former delivering the opinion said: "I have not overlooked the rule that grants from States to corporations of such *exclusive privileges* are to be construed most strongly against the grantees. But this rule, like its converse, *fortius contra proferentem*, which applies to private grants, is the last to be resorted to, and never to be relied upon but when all other rules of exposition fail. The English authorities are cited, as also the statement of the Chief Justice in Huidekoper v. Douglas, 3 Cr., 70: "This is *a contract*, and though a State is a party it ought to be construed according to those well-established principles which regulate contracts generally."

Curtis adds: "A grant such as is now in question, in consideration of the grantees risking their capital in an untried enterprise which if successful will greatly promote the public good, in no proper sense confers a monopoly. It is in substance and reality, as well as in legal

effect, a *contract*, and it is the duty of the court to give it such a construction as will carry it into full effect. This is *required by good faith; and to its demand all technical rules, designed to help the mind to correct conclusions, must yield.*" p. 86.

The remaining reference is that of the Ohio Life Insurance Company, which was a claim of exemption from State taxation. The rule is again repeated in these terms:

"The grant of *privileges* and *exemptions* to a corporation are strictly construed against the corporation. Neither the *right of taxation* nor any other *power of sovereignty*, will be held by the court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken."

The only other cases so far as I have discovered, are:

Fanning v. Gregoire, 16 How., 534.
Minturn v. Lareu, 23 How., 436.
Curtis v. Butler Co., 24 How., 448.
Jefferson Bank v. Skelly, 1 Bl., 446.
Moran v. Commissioners, 2 Bl., 722.

The cases of *Fanning and Minturn*, involved the claim of exclusive ferry rights.

The case of *Curtis* arose under an act which authorized counties to subscribe to a railroad, and the question was whether they had power to issue bonds.

The rule of strict construction is admitted where "privileges, powers, and authorities" are claimed. But, say the court: "In applying these principles, it must be done with reference to the subject matter contemplated by the legislature as a whole, and not allow its manifested intention to be defeated."

This is repeated in the case of *Moran* where a like question arose.

The case of *Jefferson Bank*, again repeats the rule in the same terms, and applies it to a claim of exemption from taxation.

From this review it is seen that the only case in which the rule of strict construction has been applied to a grant of lands, is that of Rice v. Railroad Company, and there it is a mere *obiter*.

The mind cannot conceive of a case which more strongly calls for a liberal interpretation than this. The government has received the benefit of the act; its officers have construed its terms; the President has issued the patent; the Company has borrowed money on its faith; and now a bill is filed to enable the government to resume title to the lands, and thus deprive innocent parties of the security on which millions have been loaned.

How apt are the words of the Chief Justice in Huidekoper v. Douglass. "If the State should couch its propositions in such ambiguous terms, that they might be understood differently, in consequence of which sales were to be made, and the purchase money paid, it would come with an ill grace into court, to insist on a latent and obscure meaning which should give it back its property, and permit it to retain the purchase money; all those principles of Equity and fair dealing which constitute the basis of judicial proceedings require that courts should lean against such a construction." 3 Cr., 1.

THE RAILROAD GRANT OF MARCH 3, 1863.

On the 8th of December, 1862, in the Senate, Mr. Lane, of Kansas, gave notice of two bills—

One to extinguish the title of occupancy in the In-

dians to lands in that State, and to negotiate for their removal.

The other became the act under consideration granting lands to the State.

Globe, 1862–3, p. 16.

The provisions of the first bill were incorporated in the 4th and 5th sections of the Indian appropriation act.

This act, and the act granting the lands, were both approved the same day, to wit: The 3d March, 1863, and are to be found in 12, Stat., 774 and 793.

The latter act grants to the State of Kansas for the purpose of aiding in the construction of certain railroads and telegraphic lines—"*every alternate section of land*, designated by odd numbers for ten sections in width, on each side of said road and each of its branches."

In case it shall appear when the lines of these roads "*are definitely fixed*," that the government has sold any of the lands or that the right of pre-emption, or homestead has attached to them, or that they have been "*reserved to the United States for any purpose whatever*," the Secretary of the Interior shall substitute from the public lands "nearest to the tiers of sections above specified," alternate sections designated by odd numbers.

Then there is a proviso, excepting from the *operation of this grant* all lands "heretofore reserved to the United States by any *act of Congress*, or any other manner by competent authority, for the purpose of aiding any object of *internal improvement*, or for any other purpose whatever."

All such lands are declared to be "reserved to the United States."

But this reservation is coupled with the limitation—

"except so far as it may be found necessary to locate the routes of said road and branches, through such *reserved lands*, in which case the *right of way only* shall be granted, subject to the approval of the President of the United States."

The roads for which this grant is made to the State are:

1. From Leavenworth, via Lawrence and Ohio City, crossing the Osage River to the southern line of the State in the direction of Galveston Bay, with a branch from Lawrence, by the valley of Wakalusa River to the point on the Atchison, Topeka and Santa Fe Railroad where the same intersects the Neosho River.

2. From Atchinson, via Topeka, to the western line of the State, in the direction of Fort Union and Santa Fe, Mexico, with a branch from the point of crossing the Neosho, down the valley of Neosho to the point where the first named road enters the said valley.

The consideration was the increased price of the sections remaining to the government and the increased demand for lands contiguous thereto, and the stipulation that the said roads should be public highways for the use of the government free from all charge for the transportation of their property and troops. (Sec. 2.)

The grant to the State is not absolute. In the first place it could only use the lands for the purpose of constructing the roads named.

But again, even for this purpose it could only dispose of them as each twenty miles of the road had been fully completed, certified by the government to the Secretary of the Interior, and approved by him.

If the whole lines were not completed within ten years no further sales could be made by the State, and the unsold lands reverted to the United States.

The act therefore merely declares a trust in the State for certain roads. But before any dominion could be exercised by the State over these lands, twenty miles of the road had first to be completed and reported to the Secretary. Then, and then only, the grant took effect, and the title of the government became extinguished.

Had twenty miles never been completed within the ten years, no one could have acquired any interest in these lands under this act, for until this was done the title did not pass out of the United States.

The location of the lines was made November, 1867; the map was filed with the Governor and in the General Land Office, January, 1868.

The Secretary withdrew the lands 21 January, 1868, and issued his certificate.

This certificate of the Secretary, showing the lands the State was entitled to under the act, was made under the provisions of the act 5 August, 1854, (10 Stat., 346), entitled "an act to vest in the several States and Territories, the title in fee of the lands which have been or may be certified to them."

Its provisions are: "That in all cases where lands have been, or hereafter shall be granted to any of the several States and Territories, and where the law does not convey the fee simple title, or require patents to be issued therefor, *the lists of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office*, under the seal of said office &c., *shall be regarded as conveying the fee simple of all the lands embraced in such lists* that are of the character contemplated by such act of Congress, and intended to be granted thereby, &c."

It was only when the line was located the lands could be ascertained, and it was only as each 20 miles was completed, that the Company became entitled to the alternate sections, the title to which passed from the government by the certificate of the Land Office, under the act of 1854.

We consider this position to be fully established by the case of Rice v. R. R. Co., 1 Bl., 358.

In that case the act declared, "that the lands hereby granted, &c., and that no title shall vest in the Territory, nor shall any patent issue for any of said lands, until 20 miles of said road shall be completed, &c."

The negative words here used are absent in the act we are considering; but what is expressed therein, is their full equivalent. The grant is of certain sections on each side of roads thereafter to be located, and it is provided, "that when the lines are definitely fixed" it should then appear that such sections have been sold by the United States, or they have been otherwise appropriated, or that the same "*has been reserved by the United States for any purpose whatever*," the Secretary is to select so much land nearest to the tier of sections, above specified, as shall be equal to the lands so sold or reserved.

It is self-evident therefore, that the location of the lines was first to be made before the grant could go into *operation*. Before this it was a mere float.

It would therefore have been mere surplusage to have declared, "and no title shall pass until the said lines are located."

In legal effect, we hold these acts to be the same.

Now, in Rice's case the precise question was decided, that a grant to a State or Territory of land, restricting it for the purpose of aiding a designated road, does not pass a beneficial interest *in presenti*.

That the limitation that no title shall pass until twenty miles of the road be finished is not repugnant or inconsistent with the word *grant* used in the same, and previous section of the act.

But the grant to the State of Iowa is like ours, and does not contain the negative words, and in R. R. Co. v. Fremont, 9 Wall., 94—it is said by Nelson J. delivering the unanimous opinion of the court, "until the line of the road was definitely fixed upon the ground, there could be no certainty as to the sections of lands falling within the grant; *nor could the title to any section on the line vest in the Company.* The grant was in the nature of a *float* until the line was permanently fixed." See also, Lessieur v. Price, 12 How., 59.

If any more was necessary, it would be found in the provision: "But in case it shall appear, the United States have, when the lines of the road are located, sold any section *granted as aforesaid, &c.*"

Here, while the act is called a grant, the title of the United States and its power to sell is distinctly stated as reserved until the location is made.

This is wholly irreconcileable with the theory that the title to the lands is resolvable by the date of the act.

THE PROVISO.

Having thus demonstrated that the title vested when the location was made, we are now to consider the effect of the *proviso.*

Was it intended to exclude from "the operation of the act" the lands which at the date of the act were in the occupancy of the Indians?

It was well known that the lines of these contemplated roads would, for the most part, run through those

lands. The history of the country shows that the State was covered by such rights of occupancy.

We have seen that the senator who introduced the bill, at the same time introduced a bill for the extinguishment of the Indian occupancy in these lands, and that both these bills became laws and were approved on the *same day*.

Is it not a fair and legal presumption that the act of 1863, was intended to pass such right as the government then possessed, to wit: the fee simple, the complete dominion, to be enjoyed when the Indian occupancy was extinguished.

It cannot be disputed that the enacting clause contains a grant of these lands, and in construing the proviso, it is not sufficient to exclude it by "*tacitum*" or "*dubium*," by "*possibile*" or "*probabile*," but only by "*expressum et certum.*"

Thornhill v. Hull, 2 Clark & Fin., 36.

And so this court has declared, "that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, the proviso carves special exceptions out of the enacting clause, and those who set up any such exceptions must establish them as being within the words, as well as within the reason thereof." U. S. v. Dickson, 15 Pet., 165.

It is admitted on all hands that the line described by the act itself projected the road through the Osage lands;

but it is maintained that at the date of the act treaty stipulations secured their occupancy to the Indians.

In framing the proviso, is it reasonable to suppose that Congress would carefully name lands reserved "for the purpose of aiding any object of internal improvement," and leave the highest of national obligations, a treaty stipulation, to be protected by the words "*any other purpose?*"

Support for the construction that these Indian lands are within the description of the reservation for "other purposes," is placed upon the decision of Wolcott v. Des Moines, 5 Wall, 681, and Williams v. Baker, 17 Wall, 144.

These cases are on the same statute, and we need, therefore, refer but to the former.

In Wolcott's case, the act of 1856, of alternate sections, with a reservation, in the words of the one now under consideration, was before the court.

The question was whether the lands in controversy had been reserved by "competent authority," and the court held that, reading this reservation in connection with the act of 1846, granting lands for the improvement of the Des Moines River, and in connection with the prolonged conflict among the executive officers as to the title to land above the Racoon Fork, in respect to which the act of 1856 was dealing, it was difficult to resist the conclusion that Congress, in the passage of the proviso, had specially in their minds this previous grant and conflict of opinion, and intended to reserve the lands for future disposition, if the title under the first grant should turn out to be defective.

The court say, "It has been argued that these lands had not been reserved by *competent* authority, and hence the reservation was nugatory;" but they reply, "they were

reserved from sale first by the Secretary of the Treasury, again by the Secretary of the Interior, after the establishment of his Department, and afterwards continued by him under instructions from the President and Cabinet.

Besides, if this power was not *competent*, which we think it was, and which has been exercised down to the present time, the grant of 1846 carried with it, by necessary implication, not only the power but the duty of the Land Office to reserve from sale the lands embraced in the grant."

Again: "That there was a dispute existing as to the extent of the grant of 1846, in no way affects the question. The serious conflict of opinion among the public authorities made it the duty of the land offices to withhold the sales, and reserve them to the United States till it was ultimately disposed of.

These full extracts are given of the only authority relied on, to show that the case is wholly without influence on the question now considered.

When the act of 1856 was passed excluding from its operation all lands reserved by *competent authority*, there existed an express reservation made by the two Secretaries, the President, and his Cabinet. This reservation the court held to have been made by competent authority, and if this were not enough, they held that the act of 1846 itself made the reservation.

The court having thus held that a reservation by the Secretary and other officers was the act of *competent authority*, the case fell within the *express words of the proviso.*

This decision is not authority to hold that lands occupied by the Indians are within the words "other purposes."

The proviso in this act is the formula used in all the land grants almost without exception, and is to be found

in grants to States where there were no Indian lands, and has never been used to apply to such lands.

The description is "reserved *to* the United States by act of Congress or other competent authority."

Indian occupancy of lands are not within these descriptive terms.

It is very true in Indian treaties lands excepted from the cession are demonstrated sometimes as reservations, but these are reservations to the Indians, not to the United States.

So the words "for the purpose of aiding any object of internal improvement, or for any other purpose whatever."

A familiar rule of construction shows that the general words are to have relation to the particular expressions, and are not to be applied to objects wholly dissimilar.

The proviso withdraws the lands reserved "from the *operation of this act.*"

What are the reserved lands then depends upon their condition when the act goes into operation.

If, when the lines of the road are located and the Company becomes entitled to the certificate of the Secretary, lands which had been previously reserved had been relieved of the reservation and had thus fallen into the general class of public lands, they would pass to the Company under the grant.

If these Indian lands are within the description of the reservation, how are we to understand the absolute grant of the right of way 200 feet in width, through the reserved lands, without the consent of the Indians and without compensation.

The act of 1866, granting lands for the Missouri, K.

& T. R. R., is similar to that of 1863. It contains the same proviso. By the 8th section authority is given to extend the road from the southern boundary of the State, through the *Indian Territory*, with the *consent of the Indians and not otherwise.*"

The 9th section provides "that the same grant of land through the said Indian Territory are *hereby made* as provided in the first section.

We maintain further that the validity of this grant was recognized by Congress by act, 19 April, 1871, 17 Stat., 5, which enabled this Company to improve its route, by relocating any portion of its road south of the town of Thayer, *within the limits of its grant as prescribed by the act of* 3 *March*, 1863, but not so as to enlarge or diminish said land grant.

This act of Congress was passed on the request of the State, made by a concurrent resolution, in January, 1871.

The road from the town of Thayer to the south line of the State, as then located, *passed ite entire distance through the Osage lands.* The act recognizes the grant. It neither changes, enlarges or diminishes it, but consents for the purposes of an improved location that its route may be relocated south of the town, *but within the limits of the grant of* 1863.

This relocation was to carry with it the alternate sections as provided by the act of 1863, and these were to be determined by the new line in the same manner and under like conditions as stated by the act referred to.

With the full knowledge that the lands south of the town were the Osage lands, Congress refers to the grant

made by the act of 1863, and extends its provisions to the act of 1871.

If, as is argued, the Osage lands were included in the reservation of the proviso, then equally all the lands held by other tribes of Indians.

But we then have in the same act of 1866 in the proviso to the 1 section an absolute right of way through the Osage lands without the consent of the Indians, requiring only the assent of the President.

And in the 9 section the right of way through the Indian Territory can only be had with *the consent of the Indians and not otherwise*, and here the consent of the President is not necessary.

We therefore insist that looking to the intention of Congress, the act of 1863 intended to convey such title as the government then possessed, subject to the Indian right of occupancy, to wit: the fee simple. That it was contemplated at the date of the act that this occupancy would speedily be extinguished, and if extinguished before the lines of the road were duly located, to pass the full and perfect title to the Company.

INDIAN TITLE.

We come now to consider the right of the government to make grants of land while in the occupancy of the Indians and before any treaty of cession.

The first case is that of Fletcher v. Peck, 6 Cranch, 87.

This was an action of covenant.

The first count set forth the deed of bargain and sale by Peck, the premises being part of a tract granted by Georgia, under its letters-patent, by virtue of the act of 7th of January, 1795. It averred that Peck covenanted

that the legislature was seized in fee, subject only to the extinguishment of the Indian title, and had good *right* to sell.

The breach assigned was that at the date of the act the legislature had no *authority* to dispose of these lands.

The defendant answered by plea that by virtue of the adoption of the State constitution, Georgia became seized in fee simple of the premises subject only to the extinguishment of the Indian title, and that by force of the act aforesaid, the governor was fully authorized to sell and convey the premises by letters-patent.

To this plea there was a general demurrer.

As to this the court say, "the lands in controversy vested absolutely in the grantee by the conveyance of the government made in pursuance of the act of the legislature. Being thus in full possession of the *legal estate*, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase.

Again, say the court it was doubted whether a State can be seized in fee of lands subject to the Indian title, and whether a decision that they were seized in fee might not be construed to amount to a decision that their grantee might maintain an ejectment notwithstanding that title.

The majority of the court is of the opinion that the nature of the Indian title which is certainly to be respected until it is extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the State.

The judgment of the court sustaining the title was consequently affirmed.

The only dissent was by Johnson, J. He says in reference to the first count, "we are called upon to decide

that the State of Georgia, at the time of passing the acts was legally seized in fee of the soil, subject only to the extinguishment of the Indian title. That is, Georgia was seized in fee simple in the lands, subject to another estate, we know not what, nor whether it may not swallow up of the whole estate. It would seem that the mere vagueness and uncertainty of this covenant would be a sufficient objection to it; but to me it appears that facts are sufficient to support the opinion that the State had not a fee simple."

Further on, he says, "the interest of Geogia in the lands, amounted to nothing more than a mere possibility, and her conveyance could operate legally, only as *a covenant to convey* or *to stand seized* to *a use*."

In Johnson v. McIntosh, 8 Wheat., 543, the court say: "the power now possessed by the government, to grant lands, resided while we were colonies in the crown or its grantees. The validity of the titles given by either, has never been questioned by the courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right.

In Cherokee Nation v. Georgia, 5 Pet., it is said by Marshall, C. J., "the Indians occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases." p. 14. Baldwin, J., cites Fletcher v. Peck, and Johnson v. McIntosh, and holds, "that the absolute fee, jurisdiction and sovereignty is in the

government, subject only to the right of occupancy, and that its grants vest the soil and dominion, whether the lands granted were vacant or occupied by the Indians." p. 48.

In Clark v. Smith, 13 Pet., 200, it was shown that George Rodgers Clark obtained a patent from Kentucky, in 1795.

The claim set up was by William Clark who derived title under this patent.

The Indian occupancy of the Chickasaws was extinguished by treaty in 1818.

William subsequently filed his bill to quiet the title, and it was objected that the patent was void—the lands being at its date occupied and claimed by the Indians.

This court met the objection by holding that "the ultimate fee incumbered by the Indian occupancy was prior to the Revolution in the crown and in the States afterwards, and *subject to grant.*" That, "this right of occupancy was protected by the political power, and respected by the courts until extinguished *when the patentee took the unencumbered fee.*"

In U. S. v. Cook, 19 Wall, 493, the unanimous opinion of the court pronounced by the Chief Justice, reiterates these doctrines and refers to the opinion of Baldwin J. in the case of Cherokee Nation at p. 48, holding that the possession when abandoned by the Indians attaches itself to the *fee without further grant.*

Referring to elementary writers, it is sufficient to cite the commentaries of Judge Story.—He thus sums up:

"Notwithstanding this occupancy, the European discoverers claimed and exercised the right to grant the soil while yet in possession of the natives, subject however to their right of occupancy; and the title so granted was universally admitted to convey a sufficient title to the grantees in perfect dominion, or as it is sometimes expressed in treatises of public law, it was a transfer of *plenum et utile dominium.*" 1 Story, Com. 6.

The precise question we are now considering was presented to the law officer of the government in 1859, in the Stockbridge Indian Reserve, and the opinion given by Jeremiah S. Black, Esq., then the Attorney General, is in full accord with the views here presented.

Opinions, 9 Vol., 346.

That Congress had the power to grant these lands subject to the Indian occupancy, would seem to be indisputable.

The enacting clause of the act includes these lands beyond a peradventure, and as we have attempted to show they are not excluded by reason of the proviso.

We are aided in the conclusion, that it was the intent to grant them, by the fact already stated that the Senator who presented the bill at the same time initiated the movement for the extinguishment of this right of occupancy, and that the two measures were passed on the same day into law.

Besides, there was the well-known and constantly enforced policy of the government to remove the Indians as soon as the white population pressed upon them.

Kansas, in 1863, was a State with a rapidly increasing population, and it was evident to all that the interests of the red as well as the white man required a speedy separation of the two races.

We but borrow the language of Justice Davis in the

case of the Kansas Indians, 5 Wall, 754: "The well defined policy of the government demanded the removal of the Indians from organized States. This policy was deemed advantageous to their interests, as it separated them from the corrupting influences of bad white men, and secured for them a permanent home."

THE TREATY OF 1867,

Under the provisions of the 4 and 5 sections of the Indian Appropriation Act, heretofore referred to, the President immediately entered into negotiations with these Indians for a cession of lands and their removal.

This resulted in the treaty entered into on 29 September, 1865. 14 Stat., 687.

The first art. cedes the lands described, in consideration of the sum of $300,000. The said lands to be surveyed and sold as public lands, are surveyed and sold under existing laws, but no "*pre-emption claim or homestead settlement shall be recognized.*"

The remaining proceeds of the sales after fully reimbursing the United States, were to be placed to the credit of the civilization fund.

The lands in controvery are embraced in the cession provided by this article.

The 2 article makes a cession of another tract of land. This to be sold by the Government, and the proceeds held in trust for the Indians, to be expended in building houses, purchasing agricultural implements, &c.

The 11 article provides that Railroads may have the right of way through their lands, upon the *payment of a fair compensation therefor.*

By the 12 article it is agreed, that within six months after ratification, the Indians will remove "from *the lands*

sold and *ceded in trust*, and settle upon their *diminished reservation*."

The 17 article, provides that the rejection or amendment of any of the articles by the Senate, shall not affect the other provisions, but the same shall go into effect when ratified and affirmed.

On 26 June, 1866, the Senate amended the 1st article by inserting after the word "laws," in the 38th line, the following:

"Including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands."

The Indians ratified this amendment on the 21 September, 1866, and the proclamation of the President was made on 21 January, 1867.

The act granting lands to the State for the Pacific R. R. Southern Branch under which the Missouri K. & T. R. R. claims was passed, as is seen, a month after the Senate made the above amendment, and ten months after the cession of these lands by the 1st article of the treaty, and it is maintained that the proviso in this act, which is in all respects like the proviso in the act of 1863, was intended by Congress to exclude the road from the benefit of the lands thus conveyed by the treaty of September, 1865.

But referring to the amendment, we are to enquire, what was its intention.

It introduces into the treaty a new subject—that subject is described as an act of Congress granting lands to the State in aid of the construction of a railroad *through said lands*, that is, through the lands ceded by the 1st article.

What was that act of Congress here referred to?

The act of 1863 fulfils the description in every particular, and beyond all doubt is the act referred to.

The amendment therefore is a complete recognition by the government, as well by the Indians in their adoption of it, that the act of 1863 contained a grant for a railroad *through said lands.*

The sentence amended was that which provided that the lands "should be sold on the most advantageous terms for cash, as public lands are sold under existing *laws*, but no *pre-emption claim or homestead settlement shall be recognized.*"

To prevent any misunderstanding that this act of 1863 was to "be recognized," the amendment was inserted after the word laws "including any act, &c."

We are bound to give some meaning to the amendment of the treaty. We cannot by any rule of interpretation wholly ignore it.

It was either intended to assert that the act of 1863 conveyed no interest in these lands, or that it did convey such interest.

Mr. Lane, the author of this act, as well as of the act for extinguishing the Indian title, was then in the Senate, and was most probably the mover of the amendment.

At any rate the amendment originated with the Senate representing the government. It was not made by the Indians or in their interest.

After reciting that the act made a grant "through said lands"—If it had been intended to invalidate the grant, we should have had some express provision to that effect.

We submit that the word "including," however inappropriate, cannot force us to the absurd conclusion that the Senate refused to ratify the treaty, without the Indians should assent to invalidate a grant made by itself.

"When we evidently see what is the sense which agrees with the intention of the parties, it is not allowable to wrest their words to a contrary meaning. The intention, sufficiently known, furnishes the true matter of the convention. A violation of the treaty is rather a deviation from the intention which it sufficiently manifests, than from the terms on which it is worded, for the terms are nothing without the intention by which they must be declared."

Vattel. Book 2, § 274.

In holding that the object of the amendment was to recognize the grant of 1863 to these lands, no injury is done either to the United States or the Indians.

The grant of the odd sections doubles the value of the even sections, and all lands held by the Indians as well as the Uniited States contiguous thereto are enhanced in value. The security for refunding the $300,000 purchase money is therefore not in anywise diminished but rather increased thereby, and this applies as well to the security of what is termed the "civilization fund."

CONCLUSION.

The case then is this:

The governn.ent for a valuable consideration has made a grant of lands.

The construction of that grant was properly submitted to the Executive Department.

There a most elaborate discussion was had, and all the objections now made were fully considered, and by repeated decisions of the Secretary of the Interior and the Assistant Attorney General, the State was held entitled, under the act to the lands, and a certificate to that effect issued.

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There a most elaborate discussion was had, and all the objections now made were fully considered, and by repeated decisions of the Secretary of the Interior and the Assistant Attorney General, the State was held entitled, under the act to the lands, and a certificate to that effect issued.

The State then conveyed these lands to the Company, on the faith of which capital was subscribed and the road constructed.

To raise this capital the two roads issued their bonds to the amount of nineteen millions of dollars. The capitalists who advanced this money, taking, on the faith of the action of the Executive, a mortgage of these lands as adequate security.

The government has *received the consideration, in the enhanced value of its lands*, by the building of the roads, and is now before the court seeking by technical rules of interpretation to deprive those who, relying on the acts of its highest administrative functionaries, have invested their fortunes in the enterprise invited by it.

Will not the reply of the court be, in the language of Chief Justice Marshall? "If the State should couch its propositions in such ambiguous terms, that they might be understood differently, in consequence of which sales were to be made, and the purchase money paid, it would come with an ill grace into court to insist on a latent and obscure meaning which should give it back its property, and permit it to retain the purchase money."

We have seen that from the earliest times the courts of England have declared that grants founded on a consideration are to be construed liberally for the grantee, for the honor of the King.

Will the highest court of this country do less for the honor of their government?

P. PHILLIPS,
Of Counsel for Appellant.

Supreme Court of the United States.

THE LEAVENWORTH, LAWRENCE AND GALVESTON RAILROAD COMPANY, *Appellant.*

vs.

THE UNITED STATES OF AMERICA.

BRIEF AND ARGUMENT FOR APPELLANT,

—BY—

S. O. THACHER.

Supreme Court of the United States.

THE LEAVENWORTH, LAWRENCE AND GALVESTON RAILROAD COMPANY, *Appellant.*

vs.

THE UNITED STATES OF AMERICA.

A brief history of this anomalous case is due the Court.

Congress in the Act of March 3d, 1863, 12 Statutes at Large, 772, granted lands to the State of Kansas to aid in building certain railroads therein mentioned. The State accepted the grant, and undertook to dispose of the lands for the purposes of the grant. The line of the road, with which this discussion is concerned, passed from a point near the city of Leavenworth, by the way of the town of Lawrence, the Ohio city crossing of the Osage river to the southern line of the State, in the direction of Galveston Bay in Texas. This route inevitably passed through, north and south, the tract of land known as the Osage reservation, which lay, a long narrow strip of land, on the southern boundary of the State, extending to within about twenty-five miles of the east line of the State, and westerly about two hundred and eighty one miles, being in width, north and south, about fifty miles, and in length, east and west, about two hundred and eighty one miles.

North of this tract of land to the city of Lawrence were public lands which it is admitted passed under the grant, but as the bulk of these lands were disposed of before the lines of definite location of the railroad were fixed, in 1867, but a very small portion of lands, and these of course not the best, were or could be realized to the grant. The full amount that should have been received north of the tract in question amounting in round numbers to 588,000 acres, whereas in fact the amount obtained is only $76{,}092\frac{58}{100}$ acres. Between Lawrence and Leavenworth lay what was once known as the Delaware Indian lands, all of which had been disposed of by treaty, prior to the passage of the act in question, and it may be observed, a large portion of the tract to a railroad company. *Article* 2, *Treaty of May* 30, 1860, 12 *Statutes at Large*, 1129.

The portion of the railroad between Lawrence and Leavenworth was not built by the appellant, but was built by the company mentioned in the treaty with the Delaware Indians.

The State of Kansas, by its Act of February 9, 1864, ch. 79 *Laws of Kansas of* 1864, assigned the lands it received from the United States to the appellant, on condition it would build the railroad as contemplated by Congress. Nothing, however, was done towards the building of the road, until after the treaty of the United States with the Osage Indians. 14 *Statutes at Large*, 692.

After this treaty went into effect, the lines of definite location of the railroad were fixed across the tract of land in question to the southern boundary of the State. The tract of land sold to the United States by the first article of the treaty, is the one in dispute. Whether

it passed under the grant, and by the terms of the treaty, was a point first to be known before capitalists could be induced to invest in the mortgage bonds of the company. If there was no grant in this tract of land, then the bonds were without any value and could not be negotiated. This question came before the Secretary of the Interior, Mr. Browning, in 1869. He fully considered the matter, and gave a written opinion and decision, a copy whereof is appended to this argument.

The line of definite location of the railroad was fixed through the lands, and the lands withdrawn from market by the Secretary of the Interior, for the benefit of the State of Kansas and its grantee, the defendant in this action.

This condition of affairs remained some time before even with this last inducement any parties would undertake to build the railroad and cash the mortgage bonds of the railroad company, based almost wholly on the faith of this landed security. Finally, men mostly living in New England having examined the law of Congress, the treaty with the Indians, the opinion and decision of the Interior Department, and on the faith of the evident and plain intention of that law, treaty and decision, took possession by purchase of the franchises of the railroad company, until that time in the hands of Kansas citizens without means, and as rapidly as the mortgage bonds could be placed—largely in New England—built the railroad.

As a part of the current history it is to be noticed that prior to the taking effect of the treaty a large number of persons, without any authority of law, yet in a manner not unknown to western usages respecting Indian

lands, which have no other possession beyond that of the hunter, and the village that can be moved at an hour's notice, had settled on these lands, mostly along the Neosho river.

Provision was made for these persons in the fourth article of the treaty. The lands bought by the settlers, together with the lands sold, not covered by the withdrawal for the company—namely, the even numbered sections—largely exceeded the amount the government paid the Indians, as set forth in the first article of the treaty.

After the road had been taken hold of by the present company, and was being pushed toward the State line, quite a number of settlers went upon the lands in question, intending in the first instance, it is believed, to buy the lands of the company when it should obtain title thereto.

However, when the road had been built, the right of the company to any of these lands was contested before the Secretary of the Interior by an organization of these persons called "Settlers' League." On this hearing an exhaustive argument was made by Mr. B. R. Curtis, a copy of which is herewith submitted as part of this argument. At the time of this debate before the Interior Department, one or more actions had been commenced against this company and the Missouri, Kansas and Texas Railway, in the State courts of Kansas, by settlers, to question their title to the lands. One of these suits went to the Supreme Court of the State, and that court held these settlers were on the lands without any warrant or authority of law—were trespassers, and so could not have any standing in court as plaintiffs. *Wood* vs. *Missouri, Kansas and Texas Railway Company*, 11 *Kansas*, 323.

Meantime having received its titles from the State of Kansas, the company opened an office and attempted to sell the lands to meet its obligations to its mortgage bond holders. The company's agents were notified by the Settlers' League that no sales of these lands would be permitted until the question of title was settled.

The land office of the company situated on the lands was threatened with destruction, and fear of personal violence and injury effectually prevented any sale of the lands. At the same time the authorities, State and county and township, heavily taxed the lands which the company by this "league" were forbidden to sell.

To settle the matter the company agreed with the attorneys of this "league" to make three test suits in the Circuit Court of the United States in the district of Kansas. The papers were prepared for filing on both sides, and then the attorneys of the league declined to go farther, saying that as the company had the patent title it would prevail in a court of law, though issued without authority of law, and that as the settlers were mere trespassers, no one could test the title but the United States.

Of course a single ejectment suit in which the plaintiff should offer in evidence the patent from the State of Kansas to the company, and the certificate of the general land office transferring the lands to the State, and a deed from the company to the plaintiff, on objection thereto, would have raised every question that is presented by this record. But this the attorneys of the league refused to do, and the league attempted to deny the right of any body outside of its association to even try the question in the courts.

In fine, the company could not sell the lands, was heavily taxed, was threatened with utter ruin, and the

only way out was to unite with the representatives of this settlers' association asking the Secretary of the Interior to request the Attorney General to bring this suit.

The suit presents the United States as claiming for the first time the lands in question, which for a term of years by an unvarying and consistent decision of its officers appointed to execute and administer the law and treaty aforesaid, has been held to belong to the company.

RULES OF CONSTRUCTION.

Much has been said in the discussion of this case heretofore, as to the true rule whereby this law and treaty were to be construed.

We conceive there is no difficulty on this point. The law in question clearly falls within the principle announced in *McGhee* vs. *Mathis*, 4 *Wallace*, 143, where the court says: "It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract. All the elements of a contract met in the transaction—competent parties, proper subject matter, sufficient consideration, and consent of minds."

This language the court employed in deciding the grant of swamp lands from the United States to the State of Arkansas, the avails of which, so far as necessary, to be devoted to the reclamation of the lands by levees and drains.

The elements of a contract in the law under consideration are very much stronger than in this almost gratuitous grant to the State of Arkansas.

The government doubles the value of its remaining lands, secures forever the free transportation of its

property or troops over the railroad built under the grant, and brings into market and settlement its lands before unsold and unsaleable.

Beyond question the contract made by this law of Congress and its acceptance by the State of Kansas is largely advantageous to the government, and the terms of the contract are to be construed by the ordinary and just rules established by courts of law. There is nothing in this law that should take it out of the principles of construction applicable to all contracts.

There is another principle of construction applicable alike to this law and the treaty with the Osage Indians. It is enunciated by this Court in *Edwards Lessee*, vs. *Darby*, 12 *Wheaton*, 206.

"In the construction of a doubtful law the contemporaneous construction of persons appointed to execute it is entitled to part respect." If the case shall require the examination of a law or treaty coming within this principle at an early day announced by this Court, and never modified by it, most assuredly the appellant claims its protection. For if property acquired under rules so long in force and emenating from such a source cannot be protected by them they become a delusion and snare.

The rights of the appellant depend on the construction to be placed on the law of Congress approved March 3d, 1863, granting lands to the State of Kansas, 12 *Statutes at Large*, 772, and the treaty with the Great and Little Osage Indians, 14 *Statutes at Large*, 692.

If by the terms of either or both the lands in the bill of complaint described passed to the appellant, the bill must be dismissed.

NATURE OF THE GRANT.

The position taken by the complainant must be that the grant of lands made by the act of March 3d, 1863, is *in presenti* as to the exceptions in it, and *in futuro* as to the lands passed by it.

It is gravely insisted that the provisos of the law took effect at its passage, but that the grant took effect at some future time, to be fixed by the State and its assign, on fixing the definite lines of location of the rail-road through the lands.

1. The language of the first provision is in clear conflict with this construction. It is as follows:

"But in case it SHALL APPEAR that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved for any purpose whatever," other lands to be selected in lieu thereof.

Now if the language "when the lines or routes of said roads and branches are definitely fixed" means the present tense, then is there no distinction between future and present time.

No casuistry can possibly explain this provision in the present time. It uudoubtedly preserves to the United States the lands covered by the general line or route of the road with complete power of disposition and alienation until the actual location of the lines of the road.

It is the condition of the title of the lands at that time—*the definite location* of the lines of the roads—that determines whether they are granted or not.

If at that time—a future time—absolutely impossible to be present time—the lands have been reserved by the United States for any purpose whatever, then as to those lands there is no grant. The language contemplates future action on the part of the State or its assigns. Something is to be done in the field—surveys made, different routes examined and compared, the most feasible one selected and "definitely fixed."

Moreover, before this much could be done the Legislature of the State was required to act—to dispose of the grant to some party as set forth in section three of the act.

To say then that this proviso which is dealing entirely with a condition of title yet to be ascertained and determined, and in the mean time subject to disposal by the United States, nevertheless was a present one, applying to the title as then existing, is not only to violate by judicial decree the plain and unambiguous language of a law, but it deprives the proviso of all meaning, and disables it from having any effect whatever when the "lines of definite location" shall be fixed.

The phrase in this proviso, "sold any section or any part thereof *granted as aforesaid*," unmistakably shows that while the act speaks of the lands as granted, yet in fact they are not granted, the title lost to the United States, until the line of definite location of the road determines the fact. In substance the United States says to the State of Kansas, "On such a general direction in your territory we give you such lands in alternate sections as we may own, whenever you fix definitely the routes and lines on which you will build the roads." In saying, as does the proviso, that until lines of definite

location are made, the United States may sell, or homestead, or pre-emption rights may attach to the lands *granted aforesaid*, it manifestly asserts that no grant is made, no title passed in the present time. And whether this would ever take place, wholly depended on the future action of the legislature of the State of Kansas and its assigns of the grant. Of course if the grant actually took place at the date of the act, then there would be no power of disposal in the United States thereafter, of any of the lands whatever.

And this is the construction uniformly put upon acts of like nature, including this law, by the officers of the government whose duty it was to execute it.

This first proviso relied on to take these lands out of the operation of the act, utterly fails, since it only refers to the title as existing at time of definite location of road.

This view is expressly affirmed in 8 *Opinions of the Attorney General*, 246; and it is fair to say that Congress passed the act of March 3, 1863, knowing the construction put on an act of like import by the law department of the Government.

Mr. Cushing construing the act of May 15, 1856, granting lands to the State of Iowa, says: "Instead of this it is a grant on the line of unlocated railroads. To assume that in such a case the grant vests at once would be to deprive the general proprietor of the use of his land, not only within the six sections of a line certain, but anywhere and everywhere within any possible line. Such an effect is not to be presumed. To be conceded it must be expressly enacted. But the act does not leave the question here: it proceeds implicitly to negative the supposed effect. It contemplates that the

United States shall retain power to convey, within all the possible limits of the grant, either by ordinary sale or on pre-emption, up to the time when the lines or routes of said roads are definitely fixed."

2. The second proviso relied upon to defeat the grant, is at the end of the first section of the act, and is as follows:

"And provided further, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any purpose whatsoever, be, and the same are hereby reserved to the United States from the *operation of this act*, except so far as it *may be* found necessary to locate the routes of said road and branches through such reserved lands, in which case the right of way only *shall be granted*, subject to the approval of the President of the United States."

The rule applicable to the construction of this exception is so clearly stated by Judge Curtis in his argument, that I beg to refer to it. The rule claimed by Judge Curtis has good authority to sustain it beyond the decision of the Supreme Court. In *Thornhill* vs. *Hull* (2 Clark & Finly, 36) the lord chancellor said:

"I hold it to be a rule that admits of no exception in the construction of written instruments, that where one interest is given, where one estate is conveyed, where one benefit is bestowed in one part of an instrument by terms upon which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt in order to reverse that opinion to which the terms would of themselves and standing alone have led, it is not sufficient that you should create a doubt; it is not sufficient that you should show a possibility; it is not even sufficient that you should deal in probabilities, but you must show something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way, and that the interest

first given cannot be taken away either by *tacitum* or by *dubium* or by *possibile*, or even by *probabile*, but that it must be taken away, and can only be taken away, by *expressum et certum*."

It is to be observed that the reservations in this provision are from the *operation of the act.*

The act did not operate, could not, until the further act of the legislature. Where the grant attached to particular tracts of land, there it came into operation. Until then it was a mere floating right liable to be defeated entirely by the acts of the United States in disposing of all lands covered by it, or by the failure of the legislature to accept it. Whenever the lines of definite location were made, then the reservation took effect—it could not do so sooner. And the clause further provides that as to such lands at that time, so reserved, the right of way alone "*shall be granted.*"

It is only "reserved lands" through which "it *may be found* necessary to locate the routes of said road and branches" that are contemplated by this provision and this future grant of right of way.

But the lands contained in this exception to the enacting clause of the law, are those reserved *to* the United States. If there are lands found on the line of the contemplated railroad not "reserved to the United States," in some peculiar manner, whereby the general government has appropriated them to its own use, for the purposes indicated in this act, then, of course, such lands, if they belong to the United States, or if it has any right thereto, are granted to the State of Kansas.

The lands in question were not reserved to the United States in any manner whatsoever, but were reserved as to the right of occupancy by the Osage Tribes to themselves.

It is to be observed, that while the Osage Tribes were the original owners of a large territory, including these lands, and that from time to time their possessory rights to portions of this territory have been relinquished by treaties to the United States, yet in no instance has the government undertaken to deprive them of their right, save by treaty, and in all these cessions from the Osages to the United States, they have always reserved to themselves that portion of their country unceded.

It is impossible to say that these lands were reserved to the United States, when by the very terms of the treaty declaring them a reservation, they are set apart by mutual assent and accord to the Indians.

Moreover, the United States by the treaty of June 2, 1825, 7 *Statutes*, 240, reserved certain rights of navigation in these lands to itself, thereby clearly showing that the lands themselves were not reserved to it. If the reservation to the Osage Nations was equivalent to one to the United States, why should the right of navigation be expressly reserved to the United States?

This reservation of a right of navigation, so far as the treaty is concerned, is one that really and fairly exists—a thing created—a new right established, not before in existence.

Besides, the language employed in the act of March 3, 1863, refers to something well known as a fact. For various purposes the United States has frequently reserved to itself from the operation of its grants, tracts of land for various uses, as military and postal.

In section 8, chapter 241, 14 *U. S. Statutes at Large*, it grants to a railroad company, "the right of way through the Indian Territory, wheresoever such right is now reserved or may hereafter be reserved to the United

States by treaty with the Indian Tribes." In other words, a "reservation to the United States" and one to the Osage Nations, are two very distinct things, since a treaty between these contracting nations may erect a reservation for each, and it would hardly do to say that a benefit created for the one equally inured to the other. It devolves upon those who claim that this was a reservation to the United States, and so excepted out of the operation of the general grant to show it. They hold the affirmative. No provision of law declaring that lands in a treaty expressly reserved to an Indian Nation, are likewise reserved to the United States, has been cited; until there is, we may safely rest on the fair construction of the statute.

It is claimed that this reservation had nothing to act upon unless it was these lands. This, however, is an error. The military reservation at Fort Leavenworth, with its buildings and improvements alone was of greater value than these Osage Ceded Lands. The same is nearly true of the military reserve at Fort Riley, both of which would have passed by the grant had it not been for this provision.

LEGISLATIVE CONSTRUCTION.

That Congress understood this act as hereinbefore set forth is certain. It is a familiar rule that all acts, statutes and treaties *in pari materia* are to be construed and taken together to find the *legislative intent.* This is well discussed in *Sedgwick on Statutory and Constitutional Law*, 247. He quotes approvingly the decision of Lord Mansfield that "all acts *in pari materia* are to be taken together and examined in order to arrive at the true result," and that "where there are different

statutes, *in pari materia*, though made at *different times*, or even expired, and not referring to each other, they shall be taken and construed together as one system and as *explanatory* to each other."

The Supreme Court of New York, in *The People* vs. *the Utica Insurance Company*, 15 *Johnson's Reports*, 379, decide "that, in construing a statute, the intent of the legislature is a fit and proper subject of inquiry, is too well settled to admit of dispute. That intention, however, is to be gathered from the act itself, and other acts *in pari materia*." "Such a construction ought to be put on a statute as may best answer the *intention* the makers had in view; and this intention is sometimes to be collected from the *cause* or necessity of making the statute, and sometimes from *other circumstances*." "A thing which is within the intention of the makers of a statute, is as much within the statute as if it were within the letter. And such a construction should be put on it as does not suffer it to be eluded." And it may be added that in this country statutes and treaties touching the same subject matter are to be considered of the same dignity, that is, as though they were all statutes or all treaties. So held in 6 *Opinions of the Attorney General*, 662.

If the various acts of Congress touching these grants are brought together it will be seen that the United States have always recognized their validity.

The very joint resolution of April 10th, 1869, recognizes the validity of the grant in protecting "legal rights *heretofore* vested in any party or parties." But how could there have been any equal rights "*heretofore*" vested save by the laws making railroad grants through these lands? Our attention has not been called to any other,

and beyond doubt this provision was inserted in this resolution to show how Congress understood these grants. A more significant recognition of these rights is to be found in the act of Congress of April 19th, 1871. 17 *U. S. Statutes*, 5.

The State of Kansas by a concurrent resolution of its legislature, passed in January, 1871, requested Congress to change the route of its road in the southern part of the State. Thereupon Congress passed the following act:

"*Be it enacted*, &c., That the Leavenworth, Lawrence and Galveston Railroad Company, for the purpose of improving its route and accommodating the country, may re-locate any portion of its road south of the town of Thayer, *within the limits of its grant, as prescribed by the act of Congress entitled* 'An act for a grant of lands to the State of Kansas in alternate sections, to aid in the construction of certain railroads and telegraphs in said State," approved March 3d, 1863, *not thereby to change, enlarge or diminish said land grant.*"

On the hypothesis that there was no land grant in this tract of country, this act of Congress, and that concurrent resolution of the State of Kansas, are utterly without meaning. Congress, by this last legislative expression, clearly declares that there was a land grant to this company, by the act of March 3d, 1863, south of the town of Thayer. It confines the new route of the road within the boundary of that grant, and enacts that it shall lose nothing by such change of route. The town of Thayer is not far from the geographical center, north and south, of these Osage ceded lands. The road was built to that point on its original line of location. From this point Congress, recognizing that thus far the road had been built in compliance with the grant of March 3, allows the route to be swerved from the original location,

but in careful words provides that the benefits of "*said land grant*" shall not thereby be lost or changed to the company.

Every time Congress has spoken on this subject it has recognized this grant as subsisting and valid in this tract of land, and in no instance since the act of March 3d, has it done so in stronger or more unequivocal language than in the one of April last.

The act of April 19, 1871, the proviso of the joint resolution of April 10, 1869, the provision as to disposition of these lands, mentioned in the first article of the treaty of 1865 with the Osages, the act of March 3d, 1863, all are consistent with the rights claimed by the State of Kansas and its grantee, the railroad company, and they become inconsistent and entirely inexplicable on any other theory.

How Congress, at the request of the Legislature of the State of Kansas, can assume to say that a railroad may change its route, "within the limits of *its* grant," made eight years before, when there is no such grant, and that the company shall lose none of its lands by such change, when there are absolutely no lands to be lost, is for those to explain and defend who charge such inconsistent and vain legislation upon Congress.

By that act Congress affirms that it did, in its act of March 3d, 1863, "prescribe" a land grant, not north of these lands, but within them, which has inured to the benefit of the Leavenworth, Lawrence and Galveston Railroad Company; and it will be remembered that these Osage lands extended from twenty miles north of the town of Thayer to the southern boundary of the State, and that there were no other lands to which these words, "prescribed grant," could possibly apply.

If there could be any doubt as to the construction of the first and last provisos in section one of the act of March 3d, 1863, surely the point is resolved in favor of the State of Kansas and its grantee, by clear legislation and equally solemn treaty.

There is, if possible, a still more emphatic recognition by Congress of the validity of these grants, in its legislation to carry out the terms of the treaty with the Osage Tribes, of September 29th, 1865. But this more properly belongs to a discussion of the rights conferred or recognized by that treaty.

THE OSAGE TREATY.

1. Here better than elsewhere may be considered the general policy adopted in Kansas of granting lands by treaty to aid in building railroads. Most of the Indian reserves in Kansas were disposed of in whole or in part for that purpose.

It was a favorite idea with the people of the State that these reserves should be extinguished in this way. Until within a few years on this point there was not a dissenting voice. Kansas had until 1873 but one member of the House of Representatives. That place was occupied by one person for six years, beginning in March, 1865, and in a speech at Paola, in April of that year, marking out a system of railroads for the State which should receive government aid, and designating the kind of aid to be given, he points out the Fort Scott and Gulf Railroad as one which should receive the Cherokee Neutral Lands, and the Leavenworth, Lawrence and Galveston Railroad as another which should be aided by the Osage reservation, and pledges himself as the representative of the State to do what he can to effect that object.

Now if we consider that this idea of extinguishing the Indian title and applying the net avails of these reserves to projects of internal improvements was nothing new in the State, and at that time found approval in the mouths of the men who represented the State at Washington, and that prior to this Senate amendment treaties of like import to that sought by the amendment had been concluded with the Delaware Indians, 12 Statutes, 1129–1177; with the Pottawatomies, do. 1291; with the Kickapoos, 13 Statutes, 622; and that another treaty with the Delawares looking to the same end was then pending the ratification of the Senate, 14 Statutes, 793, it will be readily understood why this amendment, hereafter to be considered, was proposed by the Senate, and what its intention was. At one time there was no dispute on this proposition. It was admitted that the intention was by the amendment to secure the building of railroads through these lands. Says Judge McComus in a brief used in the State Court in the case of *Wood* vs. *Missouri, Kansas and Texas Railway Company, pp.* 14–15, "The provision which seeks to repel the pioneer from this rich region, and (*as amended*) by the merest innovation to open it to the all-sufficient and relentless grasp of railroad corporations, is one of the most daring usurpations of single unauthorized power, to legislate without the formalities which should attend all legislation which has visited the administration of our affairs."

Excited language—which the decision of this Court in *Holden* vs. *Joy*, 17 *Wall.*, 211, showed to be mere breath.

But it states as forcibly as possible the position then taken by the other side as to the design of this amendment.

In the Court below it was not pressed as an objection to this treaty that it was not within treaty-making powers to dispose of these Indian reserves for railroad uses.

In face of the uniform current of decisions of this Court from the time of *United States* vs. *Brooks*, 10 *Howard*, 460, to the decision of *Holden* vs. *Joy*, one would suppose such a question no longer debatable.

2. It needs only a cursory examination of this treaty to see how readily the Indians would perceive the advantages of having railroads built through these lands.

There are three distinct tracts of land mentioned in the treaty.

That sold by article 1st to the United States for $300,000. That conveyed in "trust" to the United States mentioned in article 2d. That called in articles 12 and 16 the "diminished reserve," a tract of land containing several millions of acres. The land held "in trust" by the United States and the diminished reserve adjoined the tract sold to the United States by a common boundary fifty miles north and south. In those two tracts—the "diminished reserve" and the "trust land," the Osages had large interests, as the sales of the "trust lands" as provided in article 2d, and those contemplated of the "diminished reserve" as contemplated in article 16, inured directly and exclusively to their benefit, while the sale made in article 1st was an absolute one for $300,000—which money they were to receive without any reference as to whether the United States ever received one dollar for the lands. If, however, there was a surplus from the sales of these lands, it was to be invested as a "civilization fund," to be used for the benefit of all the Indian tribes in the United States.

Of course the Osage Nation had no further interest in this fund than any other tribe, and as a wise administration of the fund would expend it on those tribes mostly destitute of "education and civilization," the amount remaining for these Osages, who are numbered among the civilized Indians in distinction from the "wild Indians," would be nothing. For themselves then, these Osages received in the $300,000 all they could receive under this sale in the first article mentioned. It is manifest, then, that if by a modification of the proviso making this sale, they could secure the building of one or more railroads into a near contiguity to their "trust lands" and "diminished reserve," thereby vastly enhancing their value and giving a speedy market for them, even their untutored ignorance would allow them to comprehend such advantages.

And when this proposition is submitted to them they at once accept it.

And the sequel has applauded their sagacity. Their lands are realizing a larger price than ever Indians before received for their reservations, unaffected by railroads.

3. The record shows (page 75) that north of these Osage Ceded Lands the United States had but 76,092.58 acres of land subject to the grant. This amount of lands were totally inadequate to build the railroad desired both by Congress and the State of Kansas. Hence when this treaty came to be made it was a vital point to know whether this grant took effect or would take effect within the limits of this tract of land sold to the United States or not. If there was no grant there, or could be none, no railroad could be built. For the lands then owned by the United States were mostly in-

different, such as pre-emptors and speculators declined to take at government price. It is plain the Kansas Senators would, in such a state of affairs, seek to have this Osage ceded tract unmistakably placed within the grant. We have seen that the Indians would be greatly benefited by it, and that no possible wrong could be done them by so using a portion of this tract. Therefore, when the treaty came before the Senate the amendment to the first section was made.

Now, whether this treaty operated as a sale of the lands through the State of Kansas, according to the terms of the act of March 3d, 1863, or only contained a recognition of that disposition as binding on these lands, as decided by Secretary Browning, is really of little importance, since the result is the same in either case; and each was within acknowledged treaty-making powers, for in one way or another this clause of the treaty is bound to have effect, or else it is a nullity. A result no court would sanction.

The treaty provides that the lands shall be disposed of by sale, and that sale is made in part by the Secretary of the Interior and in part by the State of Kansas. The destination of the proceeds of these sales is different, one part going to the Indians, after deducting therefrom certain expenses; the other belonging to the State of Kansas or its grantee.

There is really nothing ambiguous or doubtful in the treaty. The provisions are plain and easily carried out by the Executive Department.

There is no gift of lands here, in the sense that is contended for by the other side. The lands to be sold on the most advantageous terms, by the Secretary of the Interior, for cash, it was undoubtedly considered, would

be worth more with a railroad through them than the whole tract would without. Such has always been the thought of the government in granting lands to build railroads, and this instance formed no exception to the rule.

4. But we are told that the object of this amendment was to "incorporate into the treaty a recognition of the validity of the grant" of March 3d, 1863, "*so that the treaty should not defeat it.*"

To this novel interpretation of the intent of the amendment there seems to be several insuperable objections.

a. We have already seen that the Representatives of Kansas in Congress were naturally desirous of having these lands beyond a peradventure pledged to this enterprise; without them the grant was a failure, and no railroad could be built. Is there any reason why they should seek for such a clause in the treaty to save the grant, where none existed? Their object was to have the lands pass under the grant. If there was no grant in these lands how could the treaty defeat it?

b. The amendment is affirmative, not negative.

It requires the lands to be disposed of under this act "granting lands to the State of Kansas in aid of the construction of a railroad through said lands."

It is the law of disposition, not of denial. In selling these lands this law is made applicable, not thwarted and forbidden to act.

c. Moreover, if this grant only extended to the north line of this Osage land, and did not operate within it whenever it should become freed from the Indian title, how could the treaty defeat it? Certainly there is nothing in the treaty or in its amendment that suggests such a fear of its effect. Surely the treaty-making

power did not deem it essential to say this treaty shall not defeat a grant outside of the tract of country covered by it.

d. On the contrary, the amendment is imperative, and requires the Secretary of the Interior to dispose of the lands under this act of Congress. And he has done so.

This controversy is really between the bond holders of the appellant and the complainant. These men took these bonds on the faith of this act of Congress, this treaty, and the decisions of the officers appointed to execute both law and treaty. If the decision of the Circuit Court is correct, these bonds have only a nominal value, and the United States will have secured the building of this railroad with all its accruing benefits at the expense of those who put faith in its acts and pledges.

As many exaggerated statements have been made as to the number of settlers on the lands in dispute, I add that the land commissioner of the appellant informs me that not over two hundred quarter sections mentioned in the bill of complaint have any occupants whatever.

It is due to the memory of Judge Curtis to say that all the printed arguments used on the other side in the Court below, were submitted to him for consideration, with the request, if he deemed it best, to reply thereto, and that he declined to do so, on the ground that he saw nothing in them that shook his confidence in the justness of his views advanced when the cause was on argument before the Secretary of the Interior.

S. O. THACHER.

DECISION OF SECRETARY BROWNING.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 8th November, 1867.

SIR: I have received yours of the 14th September last, in which you ask for instructions in regard to the sale of the Osage Indian lands, ceded to the United States by the treaty of September 29, 1865; also your letter of the 29th of August last, submitting the appeal of Hon. E. G. Ross from your adverse opinion to the right of the State of Kansas to the alternate sections of said Osage lands along the route of the Leavenworth, Lawrence and Galveston Railroad. As this was merely an opinion expressed in answer to certain inquiries addressed to you, I did not conceive that an appeal could be entertained, and I presumed that the question touching the right of the State would soon arrive in a shape in which official action would be required. Your letter asking for instructions requires me to examine the whole subject. By the act of 3d of March, 1863 (12 Stat., 772), there was granted to the State of Kansas, for the purpose of aiding in the construction of a railroad and telegraph line from the City of Leavenworth, by the way of the town of Lawrence, and via the Ohio City crossing of the Osage river to the southern line of the State, in the direction of Galveston bay in Texas, and for a branch down the Neosho valley to the point where said road enters the Neosho Valley, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road. By the act of 25th July, 1866 (14 Stat., 236), a similar grant was made to the same State to aid in the construction of the Kansas and Neosho Valley Railroad and its extension to Red river. The ninth sec-

tion of this act provides that the same grants of land through the Indian Territory are made as provided in the first section of the act, whenever the Indian title shall be extinguished by treaty or otherwise.

By article first of the treaty between the United States and the Great and Little Osage Indians, proclaimed 21st of January, 1867, said Indians, in consideration of the sum of $300,000, grant and sell "to the United States the lands contained within certain described boundaries. Said lands are to be surveyed and sold under the direction of the Secretary of the Interior, on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws, including an act granting land to the State of Kansas in aid of the construction of a railroad through said lands." The route of the Leavenworth, Lawrence and Galveston Railroad has been definitely located as far as the northern boundary of the Osage lands, and a map thereof filed in the Department. The Kansas and Neosho Valley road has signified its acceptance of the terms of the act of 25th of July, 1866, as required by the seventh section thereof. These roads are to pass through portions of the lands described in the first article of the treaty. The United States took no beneficial interest in the lands described in the second article. It constituted them a trustee with the naked power to sell and apply the proceeds arising therefrom in the manner therein set forth; the State claiming under the United States takes no title to such lands. At the time of the passage of said acts the Indian title and right of possession to the lands mentioned in the first article were not extinguished. Mr. Attorney General Black, in his opinion of 3d of June, 1860 (9 Opinions, 346) remarks: "Nothing, it seems to me, can be clearer than this proposition, namely, that when the United States, by a legislative grant, give lands to a State, a corporation or an individual, for public purposes, all the title which the United States had at

the time of the grant, or may afterwards acquire, vests in the grantee, unless the grantee has done something in the meantime which estops him from claiming the grant." The grant according to this opinion, attaches to the lands as soon as they are acquired, although some authorities affirm that when a grantor has at the time of the grant no estate in the thing granted, a subsequently acquired title will not pass by force of the grant if there be no covenant or warrantee annexed thereto. In the case before Attorney General Black, the land covered by the grant of 8th of August, 1846, to the State of Wisconsin, was situated within the Stockbridge Indian reserve, the title to which was not extinguished till 1856. Does the first article of the treaty make a disposition of these lands which is inconsistent with the railroad grants, or which exclude expressly or by implication their operation and effect? You hold that it does, but upon a full consideration of the subject I am constrained to differ with you in opinion.

Had the article been silent touching the sale of the ceded lands, they would, on becoming a part of the public domain, have been subject to the legislation disposing of it, and in the view of Judge Black, to any pre-existing grant of a portion of them for public uses. The article is not so silent. It prohibits pre-emption or homestead claims, and requires that the land be surveyed and sold for cash, as public lands are surveyed and sold under existing laws, "including any act granting land to the State of Kansas."

The act and laws so mentioned are thus made applicable to the land. They must control the disposal of it and receive such a construction of it as to give to their various provisions full force and effect, except as to homesteads and pre-emption privileges.

The clause "including any act," &c., did not form a part of the article when the treaty was signed, but was inserted by the

Senate as an amendment. It seems to have been designed to recognize by express stipulation the binding efficacy of prior grants, and to exclude any possible conclusion adverse to the rights thereby conferred, had the article remained in its original shape. If the amendment has not this effect, it is entirely misplaced and unmeaning.

Construing the article as it now appears in the treaty, I am of the opinion that any grant to the State of Kansas of the character named must be allowed as fully as if at the date thereof the United States were the proprietor of the land freed from the Indian title. The grants are confined to alternate odd numbered sections within a certain width from the line of the road, and each of its branches. Such line or route must therefore be definitely fixed before the particular sections covered by the grant can be ascertained and determined. The roads have not been located over these lands. Unless this be done, and a map of such location placed on file in the department, no part of the lands can be excepted from public sale.

I presume that the instructions which you request have reference only to the matters discussed in this communication. The papers are herewith returned.

Very respectfully, your obedient servant,

O. H. BROWNING,

Secretary.

HON. JAS. S. WILSON.

IN THE MATTER OF

THE OSAGE CEDED LANDS IN KANSAS.

ARGUMENT OF MR. B. R. CURTIS

BEFORE THE

SECRETARY OF THE INTERIOR.

DECEMBER 18, 1871.

Judd & Detweiler, Steam Job Printers.

ARGUMENT OF MR. B. R. CURTIS.

Mr. Secretary and Attorney General:

Judge Lawrence has felt it to be his duty to present this subject-matter as though now for the first time before the Department for action. I shall endeavor to show hereafter that is not the light in which this subject should be viewed; nevertheless, it is essential to the discharge of my duty that I so far follow his example as to argue the merits of the principal questions on which these titles depend. I am happy to say, however, that I shall not find it necessary to follow him in the wide excursions which he has made aside from what seems to me to be the plain, straight road which leads to a satisfactory decision. That road is not only plain and straight, but I am gratified to be able to say it is short; for whatever I can do to aid in the decision of the principal questions in this case I can do in comparatively little time.

To justify what I now say, I ask your attention at once to the great question in this case; *whether either of these railroads acquired, under the act of* 1863 *or the act of* 1866, *titles to these Osage lands.* In other words whether either of those acts made a grant out of these Osage lands to either of the railroads. It is of no consequence in this case whether both acts made a grant, or one of them; and if one, which one; because in either case, as I understand it, all the lands will be covered.

It will be necessary, however, to consider the act of March 3, 1863, separately from the act of July 26, 1866, because there are some considerations applicable to the interpretation of the act of 1866, additional to those which bear on the act of 1863; and, therefore, I will first ask your attention to the question as it arises under the act of 1863. (12 Stats., p. 773.)

It will be necessary to pay pretty close attention to the language of the statute, in the first place, to ascertain what the true question is, and then to see what are the considerations applicable to its construction.

The question is, whether the grant, which is made in clear terms in the enacting part of the law, is controlled by the proviso respecting reservations.

Judge Lawrence, after reading this enacting part of the law, said, as you will remember, in his emphatic way, that if this stood alone unqualified by the proviso, *no man could doubt* that that was a grant which would extend to these lands; so that upon the enacting part of the law no question arises. The only question is, whether this proviso respecting reservations to the United States makes an exception out of the grant so that these lands, by reason of their being a reservation within the meaning of the proviso, are taken out of what would otherwise be granted.

Now, the learned counsel has begun, and very properly begun, by propounding a rule for the construction of this grant; and he has adduced here some pretty intense statements from an opinion of Attorney General Black in propounding that rule and applying it to some case which was before him. As we all know who know and respect that very eminent and able gentleman, that he has an element of intensity in his character which makes itself felt in what he says, and there are expressions in that opinion announcing this rule, which have been so much harped upon here, that a public grant must be so clear that no doubt can be raised and entertained by anybody concerning it, which would annul in effect nearly all public grants. I do not understand that to be a safe expression of the rule. I believe the best statement of the rule—certainly the best statement of it that I have seen—is the most recent statement in the case of the Binghamton Bridge, (3 Wallace, p. 74,) and I must ask the liberty, although I am not going to read much from books, to read the statement of this rule, as laid down by the Supreme Court: "A great deal of the argument at the bar was de-

voted to the consideration of the proper rule of construction to be adopted in the interpretation of legislative contracts. In this there is no difficulty. All contracts are to be construed to accomplish the intention of the parties; and, in determining their different provisions, a liberal and fair construction will be given to the words, either singly or in connection with the subject-matter. It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be clearly ascertained, effect is to be given to the instrument used, whether it is a legislative grant or not. In the case of the Charles River Bridge," (11 Peters, p. 544,) which, you remember, is the leading and earliest case on this subject; "the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants; and the principle was recognized that charters are to be construed most favorably to the State, and that in grants by the public nothing passes by implication. This Court has repeatedly since reasserted the same doctrine; and the decisions in the several State courts are nearly all the same way. The principle is this: that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist. If, on a fair reading of the instrument, reasonable doubts arise as to the proper interpretation to be given to it, those doubts are to be solved in favor of the State; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the State. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to

sel to show that these Indian lands fall fairly within the words and reason of this proviso.

In the first place, as to the words: "That any and all lands heretofore reserved"—How? "*to the United States*—" not reserved to the Indians. When the Indians were making a sale, they had excepted out of that sale a part of their land; they did not sell it, but they did not reserve to the United States.

Well, how was the reservation to be made? "By any act of Congress, or in any other manner by competent authority." *Noscitur a sociis*, as the learned counsel frequently repeated—any other competent authority under the United States making the reservation—"for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever"—*noscitur a sociis* again—internal improvement, military affairs, hospitals, and what not, for which the Government of the United States reserves lands—"be, and the same are hereby, reserved to the United States from the operations of this act." Now, what has that to do with this reservation? This happens to be *called* a reservation. It happened to have that appropriate word applied to it in order to except this particular tract of land out of the general sales made to the United States by the Osage Indians; but it was not reserved to the United States, nor by any authority of the United States It was reserved from the United States to the Indians by the Indians at the time when they made the general sale of their lands. I say, then, that those words show that, in order to include in this proviso these Indian lands, *you must go out of the language of this act.* You have a subject-matter to which this language does not apply.

But that is only the first, though a fatal difficulty, in the construction which the learned counsel contends for. How is it reserved? What does the section go on to say? It says: "*Be, and the same are hereby, reserved to the United States from the operations of this act.*"

Now when did this act begin to operate upon any particular lands? *When could there be a reservation of any particular*

lands from, or out of the operation of this act? So long ago as the case of Lessieur *vs.* Price, reported in 12 Howard, 59, the Supreme Court decided that where the United States made a grant to the State of Missouri of four sections of land, to be selected by the State, *it was an inchoate and incomplete grant until the selections were made, and then the grant attached to the land.* Now that is this case. Here is in general terms a grant of certain described quantities of land lying in certain relations to a road afterwards to be laid out and definitely located. Well that is, necessarily, an inchoate grant, until the road is laid out, or, to use the language employed by this first section of this act, "when the lines or routes of said road and branches *are definitely fixed*," &c. It is not until the lines of the roads are definitely fixed that there is any selection made of any particular sections of land to which this grant can or did attach. It was only when the location was filed that *this act began to operate upon any particular land*, and, of course, it was only when the location was filed that this proviso could operate to take anything *out of the operation of this act.* Now when that location was filed this Osage title had been extinguished. There was no Osage reservation at the time; and, therefore, if you give effect to these words of the act, to the evident intent of the Government to have that proviso operate whenever there were particular lands for it to operate upon, and not before, you must have reference to the time when the grant attached to these particular lands by the filing of the location, and not to the date of the act when the grant was inchoate and incomplete, and nobody could know what it would attach to.

And this, I respectfully submit, is very much strengthened by the provision for indemnity lands. That provision is, that if it shall be found when the lines of routes of said road and branches are definitely fixed that the United States has reserved any of the lands—for that is one of the cases—then indemnity is to be given. Now when is it to be ascertained whether the United States has reserved any of these lands? When the routes are definitely fixed; that is the time when

it is to be ascertained. That is the time when the grant first fixes upon any particular lands, and it is the time when you can first ascertain whether any of the lands it does fix upon have been reserved. You cannot ascertain that before, because the route is not definitely fixed, and the grant has not attached to any particular lands. Suppose a claim had been made for indemnity of this kind before filing a location. Why the answer would be, when you fix your lines, when there is a conflict between your line as fixed and a reservation, then we will see what indemnity you are entitled to, but until that is done it is impossible to determine whether you will be entitled to any, and if any, what. These two parts of the act, therefore, it seems to me, show that the intention of the Government was, that when the routes should be definitely fixed then it should be ascertained whether such routes would affect a military or other reservation, and when it should be thus ascertained indemnity was to be given, but that the mere date of the act has no connection with the practical application of the act to the subject-matter of this proviso. That practical application was to be made and the proviso was to begin to operate when the selection had been made, and it thus became practicable to ascertain whether there was a conflict between the grant and the proviso.

Let me suppose a case which will still further illustrate this, for this, as you will perceive, is of the very gist of this matter. Let me suppose a case, that the United States had years ago made a reservation, and years ago they had ascertained that they did not desire it to be any longer reserved, and it had been put back into the body of the public lands before the definite location was filed, and when the definite location was filed it was found to cross this tract. Does anybody suppose that because at some former period these lands had been reserved to the United States, that would cause the proviso to operate? I think nobody would attempt to maintain this. But that is the real question which I am now considering. If the extinguishment of the reservation before the filing of the definite location a long time ago and a long

time before is sufficient, it would be just as sufficient if it was extinguished any shorter time before the filing of the location. The length of time can have nothing to do with it. What the United States really meant to provide for was, that if there should be a conflict when the lines should be definitely fixed, between those lines and any reservation made by and to the United States, the grant should not operate, and indemnity should be given in place of it. That satisfies the objects of the law, and it satisfies the language of the law.

There is one other consideration which comes in here, and which seems to me to very much strengthen the argument that this proviso was not designed to reach these Osage lands. It enacts that if it should be found necessary to locate the routes of said road and branches through lands reserved to the United States, the right of way only shall be granted, subject to the approval of the President of the United States. You will remember—and I shall have occasion to call your attention to it presently—that when the act of 1866 was passed and it was contemplated by Congress that one of the three roads which formed the plan so well developed by Mr. Cox in a paper which I shall have occasion to lay before you, when one of those roads, to wit, the Missouri, Kansas and Texas—as it was formerly, Southern Branch of the Union Pacific—was chartered, Congress contemplated that the road might go through the Indian country south of Kansas, and they granted a right of way through that Indian country, south of Kansas, but they took care to put in, "with the consent of the Indians, and not otherwise." I respectfully submit that it is not supposable that Congress, by granting a right of way in this proviso meant a right of way through Indian lands without saying a word about the consent of the Indians. They properly could grant a right of way through their own reservations, made, in the language of this proviso, to the United States and by the authority of the United States; that they could properly grant, without the consent of anybody, but could they properly, and is it supposable that they

would grant a right of way through Indian lands where the Indian title still subsisted in full force, as it did at the date of this act, without any provision for compensating the Indians or obtaining their consent? I respectfully submit, it is apparent on the face of this provision, that the United States *was dealing with its own property* in granting this right of way, and not the property of the Indians.

I come now to what I attach great, and, I think I may say, controlling importance, even beyond these suggestions as to the true construction of this proviso. In the treaty concerning which so much has been said, I think it must be admitted that one thing is not doubtful, whatever else may be doubted; and that is, that it was the purpose and intent of the Senate amendment to cause this grant, made in March, 1863, to this railroad corporation, to be recognized in the treaty, so that the Indians would have no cause to say, and no one would have any cause to say, that there was a conflict between the treaty and this grant. *That purpose*—whatever criticism may be made upon the language and upon the modes of attempting to carry out the provision—that purpose is clear beyond all question. The Senate could have had no other object in view.

Their language is, inserting after the word "laws," "including any act *granting lands to the State of Kansas in aid of the construction of a railroad through said lands.*" That describes this law. I do not here stop to argue the question, whether any act granting lands for the construction of a railroad through these lands can be read in the plural so as to apply to grants and to railroads. It is wholly immaterial for the purpose of this case. There was an act in existence. It is this one. There is an act referred to, and the language of reference, beyond all doubt, describes this one. And, therefore, I respectfully submit that when the Senate said we must have that amendment inserted in the treaty, the purpose and object of the amendment and of its insertion, were *to have this grant through the Indian lands, as it is expressly declared to be, recognized in the treaty, so that there should be no*

conflict between the provisions of the treaty and this grant. I conceive that there is no real difficulty in construing the language so as to carry out the purpose which the Senate had in view. The treaty, after the amendment, would read: "Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands." That is, there is to be added to the other laws of the United States, which provide for the survey and sale of these lands; this law of the United States. And, so far as this law contains any provisions concerning the survey or sales of these lands, this law is to operate with others. That, I understand, to be the fair meaning and effect of the amendment. Now, this law contains no provisions as to the survey of lands; so, of course, it will not operate at all in that particular, but it does contain very important provisions as to the sale of these lands. It provides, that certain of these very Osage lands shall not be sold; it provides how certain others of the lands, the remaining sections—the even numbered sections—shall be sold. Now, this treaty says, in effect, the provisions contained in this act—concerning the sale of lands—are to go into operation, and those provisions are, that only every alternate section is to be sold, and those alternate sections, when sold, are to be sold in a particular manner, here pointed out in the act. There is not the least difficulty, it seems to me, although it is clumsily expressed, in giving that effect to the amendment which unquestionably was designed by the Senate, and must be considered as having been assented to by the Indians.

What was the effect, in this same connection—though it belongs more particularly to another part of the argument—what was the effect of the declaration that no pre-emption claim or homestead settlement shall be recognized? You will remember that the purpose of this treaty was to vest these lands in the United States, first as security for the sum

of $300,000 which the United States agreed to pass to the credit of the Indians in the Treasury of the United States, and pay to them five per cent. interest thereon. The first object was that these lands should stand as security to reimburse the United States for what they had thus agreed to pay. The residue, as you know, was to go into the civilization fund. These two provisions concerning the railroad grant and the homestead and pre-emption claims, affected that security. The provision that no pre-emption or homestead right should be recognized, increased the value of the security. The provision that this act granting lands to Kansas which withdrew one half the lands, every alternate section, diminished the quantity of land, but if the railroad should be built it, in the contemplation of Congress, did not diminish the security, and it was only if the railroad should be built that the lands could be used. Therefore, while one of these provisions clearly enhanced the value of the security which the United States was to have, and the value of the interest remaining in the Indians, so far as they formed a part of the great body of the Indians who might be benefited by the civilization fund, that provision was simply for the benefit of the United States and the Indians, looking to this matter as security. The other was more speculative, but in the view of the Government as they have shown over and over again by forbidding these alternate sections to be sold for a dollar and a quarter an acre—in view of the Government it would enhance the value of the lands to have the road built and probably to a greater amount than the lands without the road ever would have been worth, certainly within any proximate time.

Now this is the posture of things presented by this treaty. The treaty, says the learned counsel, is not operative unless Congress act. He has failed to see that Congress has acted; that it has done everything necessary to bury up this question, which he has been discussing here at such length, so deep that I am sure you will never reach it in deciding this case.

Let us see what Congress has done. In the first place, they authorized the President to make this treaty with the Kansas Indians. You will find the act of Congress in 12 Statutes, page 793, section 4, in an appropriation bill. It gives authority to the President to proceed to make treaties with the Indians in Kansas, and to extinguish their titles. The date of this act is March 3, 1863? It is the same day that this act granting lands was passed, and stands in the printed volume next to the act granting lands to Kansas for the construction of railroads.

THE SECRETARY. It was approved March 3, 1863?

MR. CURTIS. Yes, sir; it bears the same date as the act granting the lands to Kansas, and is printed next to it in the book. This legislation by Congress manifestly had reference to carrying out this plan which Congress had of having these two railroads provided for in this act built crossing the Indian lands. Kansas, as has been expressed by one of the gentlemen from there, was nearly shingled over by these Indian reservations, some of which were quite small; some were larger.

The date when this amendment was made, and the Senate gave its assent, was the 26th of June, 1866. That is the date when they advised the ratification of the treaty. It is found in the 14th Statutes at Large, page 692.

There is an article in that treaty which it is important to attend to in this connection. I refer to article 17 of the treaty proper: "Should the Senate reject or amend any of the above articles, such rejection or amendment shall not affect the other provisions of this treaty, but the same shall go into effect when ratified by the Senate and approved by the President." So you perceive that when the Senate advised the ratification of this with an amendment, the pendency of that amendment did not render it at all doubtful whether the treaty would go into effect. Here is a provision that it is to go into effect, without regard to whether the amendment is finally accepted or not. If, therefore, the Indians had refused to assent to this amendment, the rest of

the treaty would, according to this article, have taken effect, so that it was not doubtful, after the ratification had been advised with the amendment, on the 26th of June, that the treaty, either amended or unamended, was to go into operation. Let us look at the legislation of Congress on the subject. On the 26th of July, 1866, just thirty days after the Senate had advised, there was an appropriation bill passed, which will be found in 14 Statutes at Large, 261, and I beg leave to read that and some other legislation before commenting upon it:

"For interest on three hundred thousand dollars, at five per centum per annum, to be paid semi-annually in money, or such articles as the Secretary of the Interior may direct, as per first article treaty of September 29, 1865."

And this provision they go on to say is made for the fiscal year ending June 30, 1867—"$15,000."

There are some other statutes which are quite important to be considered in this connection. As there might be some question, inasmuch as this was done before the amendment was assented to, I will call attention to page 504, 14 Statutes, where it will be found that they made an appropriation after the amendment was assented to. And every year since, in every Indian appropriation bill, Congress has recognized this first article of the treaty, and made this provision to carry it into effect. I desire also to refer to 14 Statutes, p. 318, because you will remember what a labored argument has been made here to show that the Secretary of the Interior could not order surveys without the authority of Congress. It is a provision for making surveys of Osage lands. I refer also to 15 Stats., p. 118, section 2, which makes an appropriation for the balance of expenses of the survey of Osage lands, and recognizes the contract which the Secretary of the Interior had made for that purpose. You will also find that Congress has taken out of the Osage fund, received from the sale of their lands, certain money to reimburse the United States. (16 Stats., p. 39.) Congress here recognized

the existence of this fund, derived from the sales of the Osage lands under the treaty, and have taken portions of it to reimburse themselves.

I have had compiled from the records of the Department some statements, showing the disposition that has been made, in point of fact, of these Osage lands. They are numbered 1, 2, 3, and 4, Osage ceded lands, and a summary of them is also here:

SUMMARY OF STATEMENTS NOS. 1, 2, 3, AND 4.

OSAGE CEDED LANDS.

No. 1. Number of entries and quantity of land entered by settlers under 4th article, treaty of 1865:

Number of settlers	143
Acres	22,197.14
Paid	$27,746 52

No. 2. Number of settlers and quantity of land entered by settlers under joint resolution, against formal protest of railroads.

Number of settlers	2,251
Acres	329,148.55
Paid	$411,316 58

In addition to these there are 200 cases undecided, covering some 25,000 acres.

No. 3. Cases especially contested by railroads, and land awarded to settlers under joint resolution.

Number of settlers	83
Acres	12,080

No. 4. Cases especially contested by railroads, and claims of settlers under joint resolution rejected.

Number of settlers	68
Acres	10,000

There have been 3,365 declaratory statements filed by settlers on these lands under the joint resolution.

The ASSISTANT ATTORNEY GENERAL. Does that give the entire number of acres of the Osage tract?

Mr. CURTIS. No, sir. It gives what has been done in the land office on the subject.

It appears then that after this treaty was negotiated it was laid before Congress. Having been negotiated by the authority of Congress, after it was negotiated the necessity for Congress to act was seen, and Congress did act. They appropriated the money necessary to perform the contract on the part of the United States, and thereby they did necessarily give the assent of Congress to that contract as contained in the first article of the treaty. They gave their assent to accept the security which had been provided by this first article of the treaty for the indemnity of the United States on account of the $300,000, and, of course, they gave their consent to accept that security, modified, as it was, by the first article of the treaty; modified in the first place by the provision that no settlement or homestead right should be acknowledged, and modified in the second place by introducing this grant of the Osage lands to the State of Kansas. That was just as much assented to, and just as necessarily assented to, by Congress, when they provided the money to carry out this bargain, as the particular clause was assented to under which they paid the money.

I respectfully submit, then, that Congress has given its assent to that recognition, which is contained in the first article of the treaty, of the fact that this act was intended to aid a railroad across the Indian lands, and to make a grant in these lands for that end, and that, instead of resting upon any imaginary authority to make treaties, it rests first upon authority granted to the President to make the treaty, and, secondly, upon the fact that the treaty was brought before Congress, and Congress assented to its terms. And so lately as the 19th of April, 1871,

Congress has explicitly acknowledged the validity of the grant to this railroad.

Stat. at Large, pamphlet, 1871, p. 5.

"An act to enable the Leavenworth, Lawrence, "and Galveston Railroad Company to locate a "portion of its road."

Be it enacted, &c., "That the Leavenworth, Law- "rence, and Galveston Railroad Company, for the "purpose of improving its route and accommodat- "ing the country, may relocate any portion of its "road south of the town of Thayer, *within the lim- "its of its grant, as prescribed by the act of Con- "gress entitled* 'An act for a grant of lands to the "State of Kansas, in alternate sections, to aid in "the construction of certain railroads and tele- "graphs in said State,' approved March 3, 1863; "*but not thereby to change, enlarge, or diminish said "land grant.*"

The town of Thayer is on those lands.

I pass from this to the other act, the construction of which is in question, and it will be found that there are some considerations applicable to this, which do not apply, in addition to those which do apply to the act of 1863. All that I have said applies to the act of 1866 as well as to the act of 1863. Its language is the same; the purpose of the proviso is the same; the extent of the proviso, I submit, you will hold to be the same. But there are some considerations applicable to the act of 1866 which do not belong to the other act of 1863.

Now, here in the proviso to the act of July 26, 1866, in the 14th Stat., p. 289, as in the other, occurs the language: "Pro- "vided, that any and all lands heretofore reserved to the United "States, &c., be reserved, &c., except so far as it may be found "necessary to locate the route of such road through said reserved "lands, in which case the right of way, two hundred feet in width, "is hereby granted, subject to the approval of the President of "the United States."

The language of the one is identical with that of the other,

and, for greater caution, or some other reason, the same clause has always been inserted in all grants for internal improvements.

It is further provided, in section 8, "That said Pacific Rail-"road Company, Southern Branch, its successors and assigns, is "hereby authorized and empowered to extend and construct its "railroad from the southern boundary of Kansas south through "the Indian Territory, with the consent of the Indians, and not "otherwise."

You will remember that the assertion is, that the proviso included these Osage lands because they were an Indian reservation. Well, if this proviso included these Osage lands because they were an Indian reservation, they included whatever other Indian reservations there were, whether Osage or Creek or Seminole, or whatever they might be. If they were Indian reservations, they came under the proviso, for the same reason that the Osage reservation did.

If that be so, there was a very large number of Indian reservations, a schedule of which I have obtained from the records of the Indian Department, showing the number of Indian reservations in the United States, tribes occupying the same, &c.

(Here it was produced.)

Now, if the Indian reservations, Osage and others, are included under this proviso, here is a right of way granted across those Indian reservations in this section, to be exercised with the approval of the President of the United States, without the consent of the Indians, or making them any compensation. But if you turn to the 8th section you will find an express authority to cross the Indian reservations with the consent of the Indians, and not otherwise. So here are two grants of rights of way over Indian reservations, one made by the proviso, to be exercised with the consent of the President of the United States, without the consent of the Indians, and the other grant of the same right of way, to be exercised only with the consent of the Indians, and without the consent of the President of the United States.

This is a perfect absurdity. It is manifest that the grant of the right of way in this proviso was not intended to cross the

Indian territory; and if not it must be because it is not a reservation within this proviso, nor, if it is, the grant of the right of way is expressly applied to it by the proviso.

There is another argument to be drawn from a careful examination of this act.

You will find in section 9 that the same grant of lands through said Indian territory are hereby made as provided in the first section of this act.

"Whenever the Indian title shall be extinguished by treaty "or otherwise, not to exceed the ratio per mile granted in the "first section of this act: *Provided*, That said lands become a "part of the public lands of the United States."

Well, Congress was willing then that this grant should extend over the Indian lands south of Kansas, always provided that the Government should thereafter extinguish the Indian title. They thought it proper, they thought it necessary, as undoubtedly it was, in order to induce the building of the road, that the grant should extend over the Indian Territory.

You will find, by a document which I am about to hand you, showing the action of Mr. Secretary Cox and the President on the subject of these Indian lands being crossed by a railroad, that the conclusion was reached, and supported by sufficient evidence, that there was a general plan on the part of Congress, that the treaties with the Indians to acquire the liberty to cross their territory, and to acquire the lands for certain purposes in that territory, and the legislation of Congress *made but one transaction*.

Now, it seems to me that when Congress passed this act, although they had not extinguished the Indian titles, they saw the propriety of extending the grant over them when they should be extinguished. What possibility is there—(inasmuch as the titles of the Osage Indians on the 26th of July, the date of this act, had been thirty days before effectually extinguished, except their six months right to remove in, and it was certain that the Indian title was to be extinguished by that treaty when the amendment should be acted on, whichever way it might be acted on)—what is the probability that Congress was willing to

grant this right over these Indian lands south of Kansas, but meant to withhold these Osage lands, where the title was already effectually extinguished?

I respectfully submit there there would be no consistency in such legislation.

How could Congress have ever supposed that each of these roads could be built, one for the distance of fifty miles and a little upwards, and the other for a distance of sixty miles and a little upwards, over an uninhabited country, with nothing but a grant of a right of way? It would be a strange mode of promoting the building of railroads in Kansas to make such a grant.

I think I ought also to draw attention to the fact, though it has been already mentioned, that on the same day that Congress passed the provision in the appropriation bill to pay the money under the first article of the treaty, to wit, the 26th of July, 1866, on that same day, showing that they then considered it a fixed fact that the treaty was to go into operation, they passed this law, granting to the Union Pacific, Southern Branch, these lands.

The ASSISTANT ATTORNEY GENERAL. There was nothing contingent about that treaty, perhaps, unless it is the ratification by the President.

Mr. CURTIS. The President may withhold his ratification, but it is pretty manifest that Congress did not expect him to, for they appropriated the money. I suppose they thought that as he had negotiated the treaty he certainly would ratify it.

The SECRETARY. You admit that the treaty did not take final effect until the President approved it.

Mr. CURTIS. It did not, sir. It is so provided. But I am concerned only with what Congress then believed and acted on.

The SECRETARY. There is a little ambiguity in the expression, but I think it applies to the treaty.

Mr. CURTIS. I think so. I think they did not mean that it should take effect until the amendments had been passed upon.

But the argument, I submit, remains the same. Congress contemplated it as certain that the treaty should take effect, and acted accordingly. I believe I have now submitted all that I desire to say on the subject of the construction of this proviso. I respectfully suggest that even if you here apply a rule, such as was supposed on the other side to be applicable, you would say that you could not give a fair construction to the proviso so as to include these Osage lands, especially after the recognition of the title of the railroad in the treaty, and the recognition by Congress of the effect of the treaty upon these lands.

I pass to a very few observations which I have to make on the subject of pre-emption. I have already said that the power to make this treaty was granted by Congress. I do not know how far the learned counsel intends to press his ideas concerning the exclusive power of Congress to dispose of lands, and I am not concerned either to admit or deny the correctness of his position. I have certainly always understood that it had been settled by repeated decisions of the Supreme Court of the United States that an Indian treaty could make a title in fee just as good as a patent; and so the court has repeatedly held; but it is not an issue here, and I do not propose to examine it.

The first inquiry to which I wish to direct your attention is, whether, at the time this treaty was made, there was anything in the laws of the United States to prevent the treaty-making power from taking lands from the Indians in trust; because if there was not anything, and these terms found in this treaty are proper to be engrafted on such a trust, then, beyond all doubt, by force of the treaty, they could stand without any legislation.

I know of nothing; certainly nothing has been produced here, which shows that when the President is authorized in general broad terms, as he was here, to make a treaty with the Indians, he cannot make a treaty to take their lands, in part or in whole, in trust for them; and, if he can, there is nothing in this act giving preëmption when the Indian title

shall be extinguished, which interferes with that, because, as you will perceive at once, the Indian title is not extinguished—it is turned from a legal into an equitable title, but it is not extinguished. If the lands are taken in trust for the Indians, they are no more open to preëmption, because the legal title has passed to the United States, than they were before the legal title passed to the United States. It is not the mere fact of investing the United States with the legal title which opens them to preëmption—it is the effectual, and final, and entire extinguishment of all title of the Indians to the land. And, if it be true that the lands may be taken in trust for the Indians without opening them to preëmption and sale, as unquestionably it may if it can be taken at all, then I submit that, if we are obliged to stand here upon this treaty alone, you would not undertake to say, in opposition to what the President and Senate have done, that this executive office will determine that what they did was unconstitutional. But, as I understand the matter, it does not admit of any doubt that Congress, whatever this first article may have contained, has legalized it and assented to it.

They have agreed to accept this security thus provided by the first article of the treaty, and to pay the money which that article provides for—security modified, as I have already explained, by these stipulations; increased in value by the promise that there should be no homestead or preëmption right allowed, and probably increased in value by the other provision, that these grants to the railroad should be carried out and made effectual.

Therefore, all the discussion of the subject of the independent power of the President and Senate, and of the inability of anybody to do anything in regard to the public lands without the help of Congress, becomes entirely immaterial in this case.

Nobody has endeavored to act without Congress, and Congress has legislated over and over again in a way to give validity and effect to whatever is contained in that first arti-

cle of the treaty. They have not only promised to pay money—and actually paid money year by year—but they have taken money out of the fund raised by the sale of these lands on two occasions.

It was said the other day that these railroads would get all. Why, the Government have received nearer $500,000 than $400,000—much in excess of the $300,000, which they agreed to become responsible for; that they have got. They have got it from these lands, and undoubtedly they have taken care that there should be some proper accounts kept to show where these funds belonged and to whom they belonged, in order that that provision of the article of the treaty might be carried out. I have not looked to see; but honesty required it should be done, and I assume it was done.

It was said that the joint resolution was a confirmation that the right of pre-emption existed. I have been wholly unable to see how. It seems to me that Congress would never have passed that joint resolution in any form, saving rights or not saving them, unless they had understood there were no pre-emption or homestead rights in these lands. What possible reason had Congress to select out these lands and give, in addition to the usual and existing privileges of pre-emption and homestead, this other one conveyed by the resolution of 1869? None is suggested; none can be shown. The only ground, as it seems to me, for the passage of this resolution of 1869 was that Congress, being of opinion that the former laws and treaties did not give pre-emption and homestead rights, undertook to do something else in place of them by the resolution of 1869. That they meant to give this privilege as an addition, I submit is not true. I do not feel it to be necessary to detain you any longer on the subject of the legal merits of the case, but I do feel it to be my duty to make some suggestions of a different character as to the manner in which this subject should be viewed by the Department at this day.

In 1867 Secretary Browning had this subject before him,

grants did cover them. They obtained the money; they expended it in building the roads; and now a class of persons represented by the learned counsel on the other side, who went on to these lands with notice that they were withdrawn from sale and did not constitute a part of the public lands of the country for purposes of settlement, come here and ask you to repudiate this action of your predecessor, on the faith of which all this money has been advanced. They ask you to do it, when their learned counsel admits that if the Department goes steadily on in the course prescribed by law, up to the point of issuing patents to these railroads under the grants, that the existence of those patents will not in the least degree affect the equity of any one man whom they represent; whereas, on the other side, if patents, as has been suggested here, were to be issued to two or more of these persons, where should we be? How can we try any title? I do not perceive how we can try our title if that should be done, and I cannot consent that the steady and regular course of the Department, which we have relied on heretofore, and do now rely upon, should be interrupted by any such suggestions.

We are perfectly willing, though we make no promises here, to give an assurance that, in order to prevent mistake, my colleague has put in writing, and which I will read, which I think is all that can reasonably be expected. It is as follows:

"It is believed that the decision of the Secretary and the Attorney General will satisfy those who have gone upon these lands that they are there without authority of law, and that this will end the controversy, but should it be otherwise it is the purpose of the companies, as it is their duty, to bring the pending litigation in Kansas to a speedy conclusion, and to do this so as to dispose of the case on its merits. In order to do this the patents are required by them, and in case the rights of the companies, as shown by the patents, are denied, it will be the duty of the companies, and they will at once commence judicial proceedings, founded on the legal title, to assert their rights."

There is a passage in an opinion of Chief Justice Marshal which seems to me to be so apposite that I beg leave to read it. It will be found in 3d Cranch, p. 1. It was a question concerning the construction of a grant of land made by the State of Pennsylvania.

Huidekoper's Lessee *vs.* Douglass:

"This is a contract; and, although a State is a party, it ought to be construed according to those well-established principles which regulate contracts generally.

"The State is in the situation of a person who holds forth to the world the conditions on which he is willing to sell his property.

"If he should couch his proposition in such ambiguous terms that they might be understood differently—in consequence of which sales were to be made and the purchase-money paid—he would come with an ill grace into court to insist on a latent and obscure meaning which should give him back his property, and permit him to retain the purchase-money. All those principles of equity and of fair dealing which constitute the basis of judicial proceedings, require that courts should lean against such a construction."

Now, is not that this case in the view in which the learned counsel presented it? The roads have been built. They have been built with the money of these mortgagees. The United States has obtained all that it ever looked to.

The State of Kansas has obtained all that it ever looked to from this grant.

And, now, comes somebody, in the name of the United States, and represents, "We have got our purchase-money; we have got what we bargained for, to wit, the railroads; but there is an ambiguity in the grant which will enable us to retain the lands and the purchase-money too."

I submit the case.

NOTE.—Secretary Browning's decision of Nov. 8, 1867.
" " special decision of January 20, 1869, in case of Gorrund *vs.* Jackson.

In this decision, Browning simply *affirms* the decision of Commissioner of General Land Office, but the Commissioner's decision will show the whole facts.

Act of Congress approved April 19, 1871, entitled "An "Act to enable the Leavenworth, Lawrence & Galveston "Railroad Company to relocate a portion of its road."

Supreme Court of the United States.

OCTOBER TERM, 1875.

LEAVENWORTH, LAWRENCE AND GALVESTON R. R. Co.

vs.

THE UNITED STATES.

ASSIGNMENT OF ERRORS.

1. That the court below did decree that the patent and all evidence of title issued by the United States to or for the benefit of the defendant below, to the lands described in the bill of complaint, be set aside, annulled, and held for naught.

2. That the court below did further decree that the defendant below had no right or title to said lands, and that it be perpetually enjoined from asserting any title or right thereto by virtue of said patents or evidence of title, or any of them, and that the defendant below pay the costs of suit.

POINTS FOR APPELLANT.

This case stands almost entirely on the same facts and the principles of law as the case of Missouri, Kansas and Texas R. R. Co. *v.* United States, No. 471—the brief and argument in which is hereby referred to and adopted.

The point of difference between the two cases is that the appellant rests upon the act of March 3, 1863, (12 Stat., 772,) while the other case stands chiefly on the act of 1866. The exceptions to and limitations upon the grants, however, are, in the two statutes, essentially the same.

The second section requires that the sections and parts of sections which by such grants shall remain to the United States within ten miles, &c., shall not be sold for less than double the minimum price of public lands when sold, and no private entry is allowed until after the land shall have been exposed at public sale to the highest bidder, so that the time of sale mentioned in the treaty of 1865 is consistent only with the idea of the sale of these lands upon the railroad land-grant system. The same valuable considerations and benefits in the interest of the United States appear here as in the act of 1866. The definite location of the line, as in the other case, was not accomplished until after the proclamation of the treaty, so that, if the statute in respect of the land grant and the reservations and the lieu lands, speaks from the date of definite location, it cannot be claimed that the lands in question fall within the description of lands reserved, &c., at that date.

GEO. F. EDMUNDS,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

THE LEAVENWORTH, LAWRENCE AND GALVESTON RAILROAD COMPANY, APPELLANT,
vs.
THE UNITED STATES. } No. 401.

THE MISSOURI, KANSAS AND TEXAS RAILROAD COMPANY, APPELLANT,
vs.
THE UNITED STATES. } No. 471.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Brief for the United States.

In the Supreme Court of the United States.

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THE LEAVENWORTH, LAWRENCE AND GALVESTON RAILROAD COMPANY, APPELLANT,
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vs.
THE UNITED STATES. } No. 471.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Brief for the United States.

These were bills in equity filed by the United States to vacate certain patents for public lands in Kansas. Decrees having been given below in each case in accordance with the prayers of the complainants, the defendants appealed.

I.

The state of facts in the former case is as follows:
The lands in question are part of a tract of 960,000 acres,

which having by treaty, (*proclaimed* December 30, 1825; 7 Stat., 240,) been reserved by the United States for the Osage Indians "*so long as they may choose to occupy the same*," was by a subsequent treaty (*advised* June 26, 1866, and *proclaimed* January 21, 1867; 14 Stat., 687) *granted and sold* by that tribe to the United States *in trust for resale as public lands, and investment of the price as part of the Indian "civilization fund."* This trust was accepted, and has been partially executed, by sales to citizens now resident thereupon, &c.

The lands in question are also included within the description, *Alternate odd-numbered sections for ten sections in width on each side of the definitely-fixed line of the railroad of the plaintiffs in error*,—supposing that there is nothing else to control the application of those terms of the act of March 3, 1863, (12 Stat., 772,) granting lands to Kansas for the purpose of aiding in the construction of such road, then known as "the Leavenworth, Lawrence and Fort Gibson." In 1864 the lands so granted were accepted by Kansas, and assigned to the present plaintiffs in error.

It is admitted that such grant, whatever be its extent, constituted a *float* until the line of road was *definitely fixed*, which occurred in November, 1867.

Other circumstances material to the controversy are—

1. In the act of 1863 Congress *excepted* from its grant to Kansas "all lands heretofore *reserved to the United States* * * * for the purpose of aiding in any object of internal improvement, or for any other purpose what-

sover," (sect. 1,) or, as the same exception is defined in a previous part of the same section, "*reserved by the United States* for any purpose whatsoever."

2. In advising a ratification of the treaty of 1867, the Senate amended the following passage therein, as indicated by the words in italics: "Said lands shall be surveyed and sold under the direction of the Secretary of the Interior on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, *including any act granting lands to the State of Kansas in aid of the construction of a railroad through such lands*, but no pre-emption claim or homestead settlement shall be recognized."

Under these circumstances the United States seek a cancellation of the patents issued to Kansas and by that State assigned to the plaintiffs in error, on the ground that the lands covered by them are excluded from the grant in the act of 1863, both upon the reason of the thing, and because of an express exception to that effect.

The railroad company replies, not only that the Indian *reservation* was at an end in November, 1867, the point of time at which its line became fixed and the land-grant fully effective, but that such sort of reservation is not within the terms of the exception quoted above, and that its subjection to the land-grant in question has been recognized or effected by the above amendment advised by the Senate a year previously to the *location*.

It also appears that the railroad company has borrowed large sums of money upon the faith of these land-

grants, and has conveyed the lands to secure the lenders. But the cause of the latter must obviously depend upon the very principles that would have determined the rights of the mortgagors in the absence of this latter transaction. The merit of the lenders as against the mortgagors throws no light upon the *title* of the latter; it only substitutes them more or less perfectly to that title, whatever it is, and where it operates most perfectly gives, as against the United States, a claim *no more than equal* to that of the mortgagor.

We submit that the matter suggested by fixing the point of time at which the *float* was *located*, is no otherwise important than as referring our attention to the question, whether these land-grants ever *floated* upon the face *of the Osage reservation*. If the floats were not wholly indefinite, but had boundaries, their subsequent location must conform to them—could not be outside of them. The whole question is as to the limits placed upon the floats by the act of 1863 and any subsequent amendatory legislation. Inasmuch as neither warranty nor estoppel is incident to conveyances by the United States, the latter operate according to the circumstances existing when they are executed, and not (unless it be specially so provided therein) upon after-acquired land falling within the terms of the description employed in them. (Carver *vs.* Jackson, 4 Peters, 87; Pollard *vs.* Kibbe, 14 Peters, 353; Rice *vs.* Railroad Company, 1 Black, 358; Taylor *vs.* Shuford, 4 Hawks, 116.)

We confine this suggestion of course to the mere effect of subsequent acquisition, leaving suggestions as to the effect of amendatory legislation upon the subject to future consideration.

We will first discuss the bearing upon this question of the amendment advised by the Senate in 1866.

1. So far as this amendment advances private interests, its location in a treaty does not exempt it from the rules of construction affecting other legislation in favor of private persons; *ex. gr.* that doubts arising thereupon must be resolved against such persons,—*contra proferentes.* (Rice *vs.* Railroad Company, 1 Black, 358.) It would be in direct contradiction to these rules to magnify an indirect and obscure allusion to a supposed private grant *into an origination of such grant.*

2. If the amendment means no more than to intimate the opinion of the Senate that the term "existing laws," contained in the treaty as transmitted to them, included the act in question granting lands to Kansas, then, subject to the remark that such intimation is a *dictum*, it is entitled to the respect due to expressions of judicial opinion by that distinguished body.

3. In such case we submit that such construction does not have the usual effect of legislative constructions upon statutes, which although inoperative for past transactions are effective prospectively, because it appears that the treaty could not *originally* have granted lands to persons and for objects *not within the consideration of the treaty.* Although a court will not nicely scrutinize the terms of a treaty for the purpose of passing upon the scope of such *consideration*, yet the present seems to be a plain case where an amendment has been *promoted* upon grounds entirely foreign to the treaty.

It is extremely doubtful whether it is competent to insert in a treaty a section legislating upon matters outside of *the consideration* of such treaty; *doubtful enough*, at least, to negative a suggestion that ambiguous words, importing probably no more than *an exclusion of a conclusion* as to a supposed previous grant of lands for railroads, were intended by the Senate to create such grant *proprio vigore.*

Upon the whole, it appears that the amendment in question is of no practical importance in the matter before us.

Before proceeding farther, we wish to direct attention to the fact that the cession by the treaty of 1867 was upon *a trust, plainly set forth*;—*of the highest merit*;—*and accepted by the United States.* The consequences of this circumstance need not be elaborated.

It remains to consider the effect of the act of 1863, *by which these lands were first conveyed to the State of Kansas.*

That a class of reservations which is the largest in extent of any known to this Government, and of any that this railroad would penetrate, the regulations of which has given Congress more thought and trouble than any other, the exclusive possession of which by those to whom it is dedicated is due to them upon every principle of natural right, and also has been carefully guarded by the policy of the Government,—that a reservation of this sort, is included within the expression *reserved "to" or "by" the United States for any purpose*

whatever, which in that act defines the lands excepted from the grant, appears to be so plain as to supersede argument.

That this reservation was not included within the land-grant might have been concluded *in the absence of any express exception*, for—

1. The designation of what was given as "*sections*," *numbered* in a certain way, was to say that they were lands at least *subject* to public survey at the time that the grant took effect as a float, which is not true of the lands in question. One circumstance affecting that land in 1863 was, that it could not be surveyed; it was legally impossible to make "*sections*" of it. The subsequent *accident* that the Indian title was extinguished before the float was located cannot enlarge the grant made in 1863.

2. The grant to railroads in 1863 of a *present* right of way through *reservations*, was to say that it was then contemplated that such railroads would be constructed during the existence of such reservations; and as the land-grants within the reservations could not be brought into market until after the Indian title should be extinguished, it follows that Congress did not then intend to include in such grant lands within such reservations.

3. Congress did not intend, in 1863, either to consolidate in *dead hands* numerous tracts, the state of whose titles would render them unmarketable for an indefinite

period, (*i. e.* until after the Indians should *choose* to leave them,) *or* to bring to sale, on behalf of beneficiaries to whom *immediate aid* was intended, vague rights to a possession so indefinitely remote as to be worthless.

We say nothing of the *Thayer* act of April 10, 1871, (17 Stat., 5,) inasmuch as it expressly leaves the rights of the plaintiff in error to be determined by the previously existing legislation.

Upon the whole—

(*a.*) *The fact that, under the Osage treaty of* 1867, *the United States are trustees in regard to the lands in question, causes a violent presumption that no legislation subsequent to such treaty has changed the terms of the trust as therein defined.*

(*b.*) *The amendment to that treaty advised by the Senate did not extend its previous meaning, and is without effect upon the claim of the plaintiffs. This is the more certain because a treaty cannot directly affect ordinary legislation upon matters wholly foreign to its purposes; and also because the amendment concerns private interests, and therefore must be treated as having been "promoted" in their behalf.*

(*c.*) *An Indian reservation is "a reservation to or by the United States," within the ordinary meaning of statutes*

excepting such reservations from land-grants for railroads; therefore the Osage reservation of 1825 *was not included within the land-grants to the State of Kansas made by the act of* 1863.

(*d.*) *Land-grants by the United States are to be construed according to the circumstances existing when they are executed; therefore the cession by the treaty of* 1867 *did not enlarge the area granted in* 1863. *This rule is not changed by the fact that the grant remained floating until after such cession, because the title, as located, could not extend to land which it had not previously covered when floating.*

II.

The case of the Missouri, Kansas and Texas Railroad Company so far as it is assignee (Record, p. 70) of the Atchison, Topeka and Santa Fé Railroad Company, (named in the above-cited act of 1863,) is covered by the above brief.

This company was formerly known as "The Union Pacific Railroad Company," (Southern Branch,) and therefore claims also the benefit of a land-grant made to the State of Kansas for the company so named in the act of July 26, 1866. (14 Stat., 289.)

Upon this point we need only say, that if such act of 1866 is to be considered as taking effect *prior* to the Osage treaty, the line of argument pursued above is

applicable also here; while, if the act is to be considered as in any sense *posterior* in effect to the provisions of that treaty, the claim of the plaintiff in error is barred by the trust created by the treaty.

[The Opinion filed in this case in the court below is not to be found in the record, but may be seen on pp. 225, &c., of the brief filed in this case by William Lawrence, esq., of counsel for the settlers.]

EDWARDS PIERREPONT,
Attorney-General.
S. F. PHILLIPS,
Solicitor-General.

In the Supreme Court of the United States.

THE LEAVENWORTH, LAWRENCE AND GALVESTON RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA.

BRIEF AND ARGUMENT FOR THE UNITED STATES.

GEO. R. PECK, *U. S. Attorney, District of Kansas.*

In the Supreme Court of the United States.

THE LEAVENWORTH, LAWRENCE AND GALVESTON RAILROAD COMPANY, APPELLANT,
vs.
THE UNITED STATES OF AMERICA.

This suit was brought for the purpose of obtaining a decree canceling and setting aside all patents which had been issued to the appellant upon the Osage ceded lands, so-called, in the State of Kansas. It is claimed by the United States that such patents were issued without authority of law, and are, therefore, null and void.

The jurisdiction of courts of equity to inquire into the validity of patents is unquestionable. Governments act through the instrumentality of officers; but officers are not exempt from errors, mistakes, and misapprehension of the law. No judicial sanctity appertains to the issuing of a patent. It is purely a ministerial act, and if, from ignorance, mistake, accident or fraud, it is issued to a party not entitled to receive it, it may be set aside. "Patents are sometimes issued unadvisedly or by mistake," says Mr. Justice Grier in *The United States* vs. *Stone*, (2 Wallace, 525,) where the officer has no authority in law to grant them, or where another party should have received the patent; in such case the law will pronounce them void."

The appropriate remedy is by bill in equity, and since the United States has the same rights as any other proprietor from whom a conveyance has been unlawfully obtained, it follows that the bill may be filed, by and in behalf of the United States.

United States vs. *Hughes et al.*, 11 Howard, 552.

The patents which are sought to be canceled in this suit were issued to the appellant by the governor of Kansas in pursuance of "certified lists" furnished for that purpose by the Secretary of the Interior. These "certified lists" contained descriptions of the lands which, in the opinion of the Secretary, had been granted by Congress to the State of Kansas to aid in the construction of the appellant's railroad. The act which it was supposed granted these lands provided for such "certified lists" instead of patents, and they operated, if rightly issued, to divest the Government of the title to the lands described in them.

The question, then, to be settled in this suit is this: Did the Secretary of the Interior, in certifying these Osage lands to the State of Kansas to aid in the construction of the appellant's railroad, act within the authority conferred upon him by law? Or, more briefly and directly stated, has any grant of these lands been made to the appellant, or to the State of Kansas for the defendant?

If it shall be found that no grant has been made, it follows necessarily that the acts of the Secretary of the Interior, by which the appellant obtained title, were unauthorized and void. It is certain that that officer does not possess the power to grant away the public domain at his own pleasure. He must be duly authorized. In the issuing of patents or other evidences of title, he is but an organ—a machine, which must be set

in motion by the legislative will. If, then, the Secretary has erred, if he has supposed that a grant had been made, when none had in fact, the patents based upon such erroneous supposition are illegal, unwarranted, and void. Confidently asserting that no grant of these Osage lands has been made, we invite the attention of the court to their history as found in the various treaties, acts, and joint resolutions concerning them.

First. The treaty of June 2, 1825, between the United States and the Great and Little Tribes or Nations of Osage Indians, (17 *Stat. at Large*, 240.)

It is this treaty which creates the Osage reservation in Kansas, and fixes its limits and boundaries. The court will observe that the first article contains a cession of a large tract of land to the United States, and that the second article provides for a reservation upon which the Indians should reside. The language is as follows: "Within the limits of the country above ceded and relinquished, there shall be *reserved, to and for* the Great and Little Osage Tribes or Nations aforesaid, *so long as they may choose to occupy the same*, the following described tract of land." Then follows a careful designation of the lines which should separate the reserved lands from the rest of the world. The lands in dispute constitute part of the reservation created by the language just quoted. The Osages continued to hold and occupy the reservation until a very recent time, and were so holding and occupying it when the act of Congress was passed which the appellant claims granted a large portion of it to the State to aid in the construction of its railroad.

Secondly. The act of Congress approved March 3, 1863, entitled "An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construc-

tion of certain railroads and telegraphs in said State." (12 *Stats. at Large*, 772.)

To this act the appellant looks as the first link in its chain of title. Here, if anywhere, its grant must be found. No argument has ever been made to sustain the claim of the railroad which does not rest upon this act for its foundation. It thus becomes exceedingly important to ascertain its true scope and meaning, and to determine what lands are granted by it and what are not.

The first section of the act is as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and is hereby, granted to the State of Kansas, for the purpose of aiding in the construction, first, of a railroad and telegraph from the city of Leavenworth, by the way of the town of Lawrence, and via the Ohio City crossing of the Osage River, to the southern line of the State, in the direction of Galveston Bay, in Texas, with a branch from Lawrence, and via the Ohio City crossing of the Osage River, to the point on the Atchison, Topeka and Santa Fé Railroad, where said road intersects the Neosho River; second, of a railroad from the city of Atchison, via Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Sante Fé, New Mexico, with a branch from where this last-named road crosses the Neosho, down said Neosho Valley, to the point where the first-named road enters the said Neosho Valley, every alternate section of land, designated by odd numbers, for ten sections in width on each side of said road and each of its branches. But in case it shall appear that the United States have, when the lines of said road and branches are definitely fixed, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same *has been reserved* by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to

be selected, for the purpose aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which rights of pre-emption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers, and selected by direction of the Secretary of the Interior, as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid: *Provided, further*, That the lands hereby granted for and on account of said roads and branches severally shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided: *Provided, also*, That no part of the land granted by this act shall be applied to aid in the construction of any railroad, or part thereof, for the construction of which any previous grant of land or bonds may have been made by Congress: *And provided further, That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.*"

It is unnecessary to give the other sections of the act, as they do not affect the questions involved in this suit.

The legislature of Kansas accepted the grant, and designated the appellant as the company to build the road from Leavenworth to the southern line of the State and to receive the grant. (Gen. Stats. of Kansas, 888.)

In constructing its road from Leavenworth to the south line of the State, the appellant crossed the Osage

reservation, and inasmuch as Congress had given it a grant of land on each side of its track, it set up a claim to the Indian lands, insisting that they were as much covered by the grant as were the public lands through which for many miles the road extended; in which view the Secretary of the Interior concurred.

We submit two propositions:

I. Mere general words, such as are used in the first section of the act of 1863, will not operate to include in a grant of the public lands a reservation set apart and appropriated for a special and particular purpose.

II. But if the general words of the act of 1863 could so operate to make a grant of the Osage reservation, there is a proviso in the act which explicitly and in terms excepts those lands from the operation of the act.

It is apparent that either of these propositions. if sound, must be fatal to the claim of the appellant; that both are sound, just, and reasonable, is susceptible of absolute demonstration.

Let us take up the first proposition, which I will discuss independently of the proviso, and as if no proviso existed.

The granting part of the act is in general language. It does not in terms include or exclude the Osage lands. It simply makes a grant of lands. But what lands? No lands were granted unless Congress *intended* to grant them; and that intention, I respectfully submit, must be gathered from the language of the act and from the condition of the lands at the time of its passage. There is no dispute as to the condition of the lands. It is conceded that they constituted an Indian reservation. For forty years the Osages had occupied them, secure in a title which had been guaranteed by a solemn treaty. The lands were theirs, in the language of the treaty of

1825, "so long as they might choose to occupy the same." In the free exercise of that choice they might occupy them forever. No attempt had been made by the Government to extinguish their title; no treaty was pending. Nothing indicated an intention on the part of the Government to obliterate the line which separated this reservation from the public lands. Is it possible to conceive that Congress deliberately intended to grant lands so situated as a donation to a railroad company? It did not say so; and yet the English language is rich in words adapted to express such intention had it existed. Will the court *presume* that Congress intended what it did not say, and what it *could* not say without a palpable and glaring violation of good faith? It is plain that no grant of these Osage lands could be made in 1863, except by wilfully disregarding the treaty of 1825. But such dishonorable conduct cannot be imputed to the legislative branch of the Goverment. It must not be forgotten that legislative grants are strictly construed against the grantee. If there be doubts they must be resolved in favor of the Government; nothing passes by implication. The grantee takes only what is plainly and unmistakably *intended* to be granted.

Dubuque and Pacific Railroad vs. *Litchfield*, 23 Howard, 66.

Rice vs. *Railroad Company*, 1 Black, 380.

Charles River Bridge vs. *Warren Bridge*, 11 Peters, 420.

Is there anything in the act of 1863 which shows that Congress intended to grant this Osage reservation? Notoriously the general policy of the Government, in making these railroad subsidies, was to grant only the public lands—lands which were vacant, unoccupied, and

free from any outstanding claim or interest. Any other policy would have led to protracted and vexatious conflicts. Suppose that instead of being an Indian reservation, these Osage lands had constituted a military reservation, set apart for military purposes; would any one claim that, by the mere general words of the act of 1863, any portion of it would have passed to the appellant? Suppose a United States post-office or custom-house had occupied one of the odd sections covered by this act, would it pass to the appellant? Of course it would not. But why not? There is no reason why a military reservation would not pass by general words as well as an Indian reservation. Indeed, there would be much more reason for holding that the appellant could take a custom-house or arsenal under this act, than an Indian reservation. Why? Because a reservation for military or postal or commercial purposes is the absolute property of the Government. It may exercise its own pleasure in disposing of it. It may do what it will with its own. But not so with an Indian reservation. Other rights are involved. These Osage lands did not belong to the Government. They were the lands of the Osages "so long as they chose to occupy them." Therefore Congress could not grant them to the appellant, except by arbitrarily violating the rights of the Indians and the provisions of the treaty of 1825. Nothing in the act of 1863 shows that Congress intended to commit so great a wrong. Surely the court will not *presume* such intention.

The proposition that the general words of the act of 1863 cannot be construed to make a grant of lands, set apart for a particular purpose, is not only sound and reasonable, but I am happy to add is sustained by a decision in this court. I refer to *Wilcox* vs. *Jackson*, 13

Peters, 498. In that case, the President, by proclamation, had ordered a sale of certain lands near Chicago. Within the boundaries of the lands, ordered to be sold, was a small tract which had formerly belonged to the military reservation at Fort Dearborn. In the proclamation the tract of military land was not reserved or excepted. Nothing was said about it. By the general words of the proclamation this tract was included with the lands to be sold. But the court held that the military tract was not included, laying down the doctrine in these words: "But we go further and say that *whenever a tract of land is once legally appropriated for any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and no subsequent law, proclamation, or sale would be construed to embrace it or to operate upon it, although no reservation were made of it.*"

The language of the court, it will be observed, is clear and emphatic. It goes directly to the issues of this case. It leaves no room for argument. Reduced to a syllogism, and applied to this case, it stands thus, impregnable:

I. Land severed from the mass of public lands, by being appropriated for any purpose, will not be included in a subsequent law general in its terms.

II. The Osage reservation was severed from the mass of public lands, by being legally appropriated as an Indian reservation.

III. Therefore the Osage reservation is not included in the general terms of the grant of 1863.

THE PROVISO.

I have discussed this case thus far upon the general language of the granting clause in the act of 1863. I have shown, I think, that the granting words do not in-

clude these Osage lands. But I will show more. There is a proviso to this granting, or, as it is sometimes called, enacting clause. I do not think any proviso was necessary, and I discuss it only to add to that which is already conclusive. It is in these words:

"*And provided further*, That any and all lands, heretofore reserved to the United States, by any act of Congress, or in any other manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for *any other purpose whatsoever*, be, and the same are hereby, reserved to the United States from the operations of this act, except so much as may be found necessary to locate the routes of said road and branches through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

Let us analyze this proviso. It reserves something from the operations of the act. Now what does it reserve? It reserves all lands which had been "heretofore reserved." "Heretofore," means before the passage of the act. As to lands which had been reserved for any purpose, before the passage of the act, it does not apply. The first question, then, which arises upon the proviso is this: Had the Osage lands been reserved within the meaning of the proviso, prior to the passage of the act of 1863? It is admitted that they had been reserved, but the appellant gravely insists that they were not reserved "to the United States," and therefore are not covered by the proviso. To whom, then, were these lands reserved, if not to the United States? The triumphant answer of the appellant is, that they were reserved to the Osage Indians. To support this position, it is said that the Osage reservation was created by the treaty of 1825, and that the language used is, "There is hereby reserved to and for the great and little tribes or nations of Osage Indians." Furthermore the appellant urges

that provisos must be strictly construed against those claiming under them, and that as the United States is here claiming that these Osage lands are covered by the proviso, it is incumbent upon the Government to clearly show that they are. Whereupon the appellant proceeds to show, by a "strict construction" of the proviso, that it does not cover the Osage lands.

But the trouble with the appellant's theory is that the proviso under consideration is a proviso to a *public grant*. In construing a public grant the intention of the law-making power is to be sought. How is that intention discovered? By an examination of the whole act, *provisos and all*. And if any doubts arise from a consideration of the whole act, they are to be resolved against the grantee and in favor of the Government. If I make a donation to a friend, reserving something to myself, and a quarrel arises between us, will the construction of my proviso be most strict against me? Will my friend take everything which I cannot "clearly show is excepted by the proviso?" Will an exception to a charitable bequest be strictly construed against the giver? If so, let benevolent people beware. There is, or should be, a reason for every rule. Why are public grants construed most strictly against the grantee? I think the true reason is that they are acts of grace and charity; and the recipient ought not to take more than was intended to be granted. This act of 1863, being a public grant, it devolves upon the grantee to show *from the whole act* that it is entitled to the land it claims.

But not only is the strict-construction-of-provisos theory absurd and unreasonable, but it is in direct conflict with a half dozen decisions of this court. This same proviso has been attached to numerous other congressional grants. It has often been before the court,

and in every instance has been reasonably and fairly construed, according to the just meaning of the language.

In *Wolcott* vs. *Des Moines Company*, (5 Wallace, 681,) the question arose in this wise: Congress, in 1856, passed an act granting lands to aid in the construction of certain railroads in Iowa. The act contained this same proviso which we are now considering. It happened that, prior to the act just mentioned, Congress had passed an act granting lands to aid in improving the navigation of the Des Moines River. A dispute had arisen as to whether the river-grant extended above Raccoon Fork, and after a prolonged controversy it was settled that it did not. Nevertheless, the lands above the fork had been certified to the State under the erroneous supposition that they were covered by the grant to the navigation company. It happened when the line of the railroad company was fixed that it ran across the lands above the fork which it had been supposed were granted to the navigation company. When it was discovered that the first grant had failed above the fork, it was claimed that the railroad company could take under its grant that portion of them which came within its limits. But the court said that the railroad company could not take them, because they were excluded by the proviso as having been "heretofore reserved to the United States." But if the court had given a technical, a strict construction to the proviso, it could not have so held, for the lands above the fork had not been reserved "to the United States." Let it also be observed—for it will be important here after—that the court in construing the proviso looked solely at the condition of the lands *at the time the act was passed.*

The same construction was subsequently given to this proviso by the court, upon the question whether swamp-lands which had been previously granted to the State were covered by the proviso. The court held that they were.

Railroad Company vs. *Fremont*, 9 Wallace, 89.

Railroad Company vs. *Smith*, 9 Wallace, 95.

Now, none of those swamp-lands which were in dispute had been reserved "to the United States" in a literal and technical sense. But they came within the spirit of the proviso, and were therefore held to be covered by it. Very recently, in *Williams* vs. *Baker*, 17 Wallace, 144, this court construed the proviso in question, and, after full argument and an urgent appeal to the court to reconsider its former rulings, declared the decision in *Wolcott* vs. *Des Moines Company* to be correct.

Thus it will be seen that whenever this proviso has come before the court, it has received a construction very different from the subtle and fastidious one with which the appellant favors us. But I assert that in none of the cases which have heretofore been before the court have the lands in dispute been so obviously within the terms of the proviso as they are in this one; for not only by the spirit, but by the very letter of the proviso, these Osage lands are excluded from the grant of 1863. Let us see. They were reserved by the treaty of 1825. They were reserved out of a vast tract of land which the Osages by that treaty ceded to the United States. The cession is made in the first article, and the reservation in the second, *out of the lands ceded by the first.*

Who made the reservation in the treaty? Not the Osages alone, but both parties. The language is, "Out of the lands above ceded there shall be reserved to and *for* the Great and Little Tribes, &c." It was *for* them,

as well as *to* them. The mutual action of the parties to the treaty made this reservation; set it apart for a special and particular purpose. Both parties were interested in it, and it was reserved to one as much as the other. It may be said that the lands could not be reserved to the United States and to the Indians at the same time. It might with equal reason be urged that the functionary who is mentioned in the treaty as the agent "for said tribes" is not also agent "for the United States." When the act of 1863 was passed, this reservation was, so far as the United States was concerned in dealing with its lands, a reservation "to the United States." Reserved means withheld, kept back, retained. These lands had been withheld, had been retained and kept back by the United States in all their dealings with the public lands in Kansas. That they come within the meaning of the proviso is perfectly clear, both upon principle and the repeated decisions of this court.

In the argument of this case before the Secretary of the Interior, and in the court below, the counsel for appellant urged with great vigor the argument that, as the grant could not attach till the line of the road was definitely fixed, and when the line was fixed, the Osage lands had ceased to be a reservation, (the Indian title, in the meanwhile, having been extinguished;) therefore, there was nothing for the proviso to operate upon, and the grant attached, notwithstanding the proviso. I shall show hereafter that the Indian title had not been extinguished at the date of the definite location of the road, nor at any subsequent time. But it would make no difference if it had. The proviso has nothing to do with the time when the grant attaches. It does not simply exclude lands which *shall be found to be reserved when the grant attaches*, but absolutely ex-

cludes from the operations of the act all lands which had *then*, namely, in 1863, been reserved. If the court will examine the first section of the act, it will be perceived that immediately above the proviso there is a clause giving the railroad the right to select other lands in case it shall be found, when the line is definitely fixed, that any of the land granted by the act had been sold, or the right of pre-emption had attached, or that the United States had reserved it. This indemnity clause has reference to the time when the line of road "is definitely fixed," *and so declares.* But not so the proviso. The proviso would be entirely unnecessary if it also related to the time when the line became "definitely fixed," for that contingency had already been provided for by the indemnity clause. It is an absurdity to suppose that the mere delay of the defendant in fixing the line of its road could prevent the proviso from having any efficacy. But that is the result claimed by the appellant. If it had been prompt, and built its road immediately, the proviso would have prevented it from getting the Osage lands, but by waiting it beat the proviso, and obtained them. This theory is so ridiculous that I cannot find that it was ever urged before. In *Wolcott* vs. *Des Moines Company*, the entire reasoning of the court upon this proviso was based upon the condition of the land *when the act was passed.* If it was reserved *then*, it was excluded by the proviso from the operations of the grant. The same is true of all the other cases in which this proviso has been passed upon.

Having demonstrated that these Osage lands are not covered by the enacting clause of the act of 1863, and are also excluded by the proviso, it would seem unnecessary to add to what has already been said. But a certain treaty, made in 1865 and ratified in 1867, having

been invoked by the defendant as making a grant through these lands, it seems proper to examine it.

THE TREATY OF 1865.

The court will find this treaty in 14 Statutes at Large, (page 687.) It is supposed by the appellant that this treaty extinguished the Indian title, whereupon the lands were left free for the grant to attach. But I have already shown that there was no grant, so far as these lands were concerned. If the act of 1863 did not make a grant, the mere extinguishment of the Indian title did not. But the truth is the treaty of 1865 did *not* extinguish the Indian title, so that it seems a waste of time to discuss what would have happened if it had. Let us examine the treaty, and we shall discover that it does not extinguish the Indian title; does not change the character of these lands as an Indian reservation; does not bring them into the mass of public lands. It cedes two tracts of land. One tract is described in the first section, and has since been called the "*ceded lands.*" The other is described in the second section, and has since been known as the "*trust lands.*" The lands in controversy in this case are the *ceded* lands, but they are just as much *trust* lands as the other tract. It is not what things are called, but what they are, which determines their character. Both tracts were ceded to the United States, subject to certain conditions to be performed by the United States. These conditions raise a trust connected with the lands. The United States became a trustee. There is but one way in which the title of those who created the trust can be extinguished, and that is by carrying out the trust according to its terms. What is a trust? It is defined by Bouvier to be "a right of property, real or personal, *held by one*

party for the benefit of another." And again, "An obligation upon a person arising out of a confidence reposed in him *to apply the property faithfully, and according to such confidence.*"

"In order to originate a trust two things are essential: first, that the ownership conferred be connected with a right, or interest, or duty, for the benefit of another; and, second, that the property be accepted on those conditions."

"No particular form of words is necessary to create a trust. The court will determine the intention from the general scope of the language."

Bouvier's Law Dict., Title, Trust.

Willis' Trusts, 1.

4 *Kent's Com.*, 295.

2 *Fonblanque Equity*, 1.

1 *Saunders, Uses and Trusts*, 1.

10 *Johnson*, (*N. Y.*,) 496.

If the court will examine the first article of this treaty, which is the article covering these lands, it will be perceived that the cession to the United States was coupled with terms, conditions, and limitations creating a pure and express trust. If A conveys lands to B, with the condition that B shall cause them to be surveyed and sold, and pay the money into a certain designated fund, is not B a trustee for carrying out the provisions of the conveyance? Most assuredly, and the relations would be just the same if A happened to be a tribe of Indians, and B the United States.

The first article of the treaty reads as follows:

"ART. 1. The tribe of Great and Little Osage Indians, having now more lands than are necessary for their occupation, and all payments to them from the Government under former treaties having ceased, leaving them

greatly impoverished, and being desirous of improving their condition by disposing of their surplus lands, do hereby grant and sell to the United States the land contained within the following boundaries, that is to say: Beginning at the southeast corner of their present reservation, and running thence north with the eastern boundary thereof fifty miles to the northeast corner; thence west with the northern line thirty miles; thence south fifty miles to the southern boundary of said reservation, and thence east with the said southern boundary to the place of beginning: *Provided*, That the western boundary of said lands herein ceded shall not extend farther westward than a line commencing at a point on the southern boundary of said Osage country one mile east of the place where the Verdigris River crosses the southern boundary of the State of Kansas. And in consideration of the grant and sale to them of the above-described lands, the United States agree to pay the sum of three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians in the Treasury of the United States, and interest thereon at the rate of five per cent. per annum shall be paid annually in money, clothing, provisions, or such articles of utility as the Secretary of the Interior may from time to time direct. *Said lands shall be surveyed and sold under the directions of the Secretary of the Interior on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws; but no pre-emption or homestead settlement shall be recognized, and after re-imbursing the United States the cost of said survey and sale and the said sum of* $300,000 *placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States, to the credit of the civilization fund, to be used under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the United States.*"

The above article expresses the agreement of the parties to this treaty. It points out how these lands shall be surveyed and sold, and what shall be done with the money. Beyond all question the United States became

a trustee for carrying out these conditions. We are not alone in this opinion, for when this case was argued before the Secretary of the Interior, the distinguished gentleman who represented the appellant, Judge B. R. Curtis, strenuously insisted that pre-emption rights could not attach to these lands, because the Indian title had not been extinguished, but simply passed to the United States in trust. This is his language:

The first inquiry to which I wish to direct your attention is, whether, at the time this treaty was made, there was anything in the laws of the United States to prevent the treaty-making power from taking lands from the Indians in trust; because if there was not anything, and these terms found in this treaty are proper to be ingrafted on such a trust, then, beyond all doubt, by force of the treaty, they could stand without any legislation.

I know of nothing—certainly nothing has been produced here—which shows that when the President is authorized in general, broad terms, as he was here, to make a treaty with the Indians, he cannot make a treaty to take their lands, in part or in whole, IN TRUST FOR THEM; and, if he can, there is nothing in this act giving pre-emption when the Indian title shall be extinguished, which interferes with that, because, as you will perceive at once, THE INDIAN TITLE IS NOT EXTINGUISHED—it is turned from a legal into an equitable title, but it is not extinguished. If the lands are taken in trust for the Indians, they are no more open to pre-emption, because the legal title has passed to the United States, than they were before the legal title passed to the United States." (Argument, page 21.)

Now, if the Indian title was not extinguished by the treaty, what becomes of the appellant's theory that the grant attached to these lands upon the extinguishment of the Indian title? If the grant attached, how can the trust be carried out? How can the lands "be sold for cash?" How can the proceeds be "placed to the credit of the civilization-fund?" How can any of the terms of

the trust be executed if the appellant takes the land? The claim of the railroad to these lands leads only to absurd and inextricable difficulties. It has no foundation; it defeats itself. All trusts are sacred, but this one was peculiarly so, because one of the parties was a great nation; the other, a feeble race of half savages. When the United States accepted the land, it accepted the trust, with all its requirements, its conditions, and limitations. That trust ought to be executed in good faith.

But in the path to so desirable a result are these patents which we have asked to have canceled. Surely the court will not refuse so reasonable a request.

THE SENATE AMENDMENT.

Having shown that neither the act of 1863 nor the treaty gives the appellant any right to these lands, I come now to inquire whether the amendment to the treaty does so. The amendment was attached to the treaty by the Senate, and is inserted after the word "laws" in the first article. It is in these words: "Including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands." The court will observe that the amendment is injected into that provision of the treaty which prescribes how these lands shall be surveyed and sold; so that it reads, "Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, [*including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands;*] but no pre-emption claim or homestead settlement shall be recognized."

It is obvious that this amendment does not, in and of itself, make a grant. It does not profess to. But it has been urged that it recognizes a former grant. The court will perceive that this is begging the whole question. If there *was* no former grant, a recognition of one would simply be the recognition of something having no existence. You cannot put a grant into the act of 1863, by recognizing or assuming that it contains one. A corpse will not breathe because you call it by name. We have shown that the act of 1863 conferred no rights whatever upon the appellant in this Osage tract. But, if it has no rights, except such as conferred by the act of 1863, it has none at all, for the Senate amendment does not profess to confer any new rights but to protect old ones, *if such existed*. Bear in mind, the Senate amendment does not assert that there was any act granting said lands in aid of a railroad. The theory that it "recognizes" the existence of a grant in the act of 1863, is entirely unfounded. It neither affirms nor denies that a grant had been made. It directs the Secretary of the Interior to "cause said lands to be surveyed and sold upon the most advantageous terms for cash, as public lands are surveyed and sold under *existing laws*, (INCLUDING any act granting lands," &c.) The Secretary held that the act of 1863 made a grant through these lands to aid the appellant, and that, therefore, the amend ment required him to "include" it in surveying and selling the lands. Now, if the Secretary erred, if the act of 1863 did not make a grant of the Osage tract, then, of course, he ought not to have "included" that act in disposing of the lands. We have shown by absolute demonstration that the act of 1863 did not grant these Osage lands; nor was there any other act which granted them. Therefore, when the Secretary came to dispose

of the lands, there was no act "granting lands," &c., to be included with "existing laws," and he was left to dispose of them as required by the treaty, viz, "upon the most advantageous terms for cash."

No one ever examined this treaty with the amendment dovetailed into the first section without being forcibly impressed with the awkward clumsiness of the language. The treaty itself is clear and plain. It is the amendment which makes it ambiguous and almost unintelligible. It is, as was said by appellant's counsel in his argument before the Secretary, "clumsily expressed." But I submit that an amendment "clumsily expressed" ought not to warp the plain meaning of the language both preceding and following it. Inserting the amendment in its place, after the word "laws" in the first section of the treaty, and reading the section *with the amendment*, it will be perceived that just before the amendment it requires the lands to be sold for cash, and just after the amendment it provides what shall be done with the money. But between these two provisions a "clumsily-expressed" amendment is inserted, which, the appellant claims, destroys both. Did the Indians so intend? Did they mean to devote these lands to the building of railroads? "*The language used in treaties with the Indians should never be construed to their prejudice*," said Chief-Justice Marshall, in *Worcester* vs. *The State of Georgia*, 6 Peters, 515. And in the same case he said, "HOW THE WORDS OF THE TREATY WERE UNDERSTOOD BY THIS UNLETTERED PEOPLE SHOULD FORM THE RULE OF CONSTRUCTION." Now, how was this amendment understood by the Osages? Black Dog, Little Bear, and the other chieftains who ratified it, were not lawyers. They had made the treaty. They had created a trust. They had provided for the civilization-fund.

Everything was plain and clear. The amendment came back from Washington; but it was a small one. They signed it, each with his X mark. And now it is claimed that that clumsy little amendment was the only vital thing in the whole treaty. It must stand though all the rest should fall. Such is the opinion of the appellant. But what did the Osages think?

What was the object of this treaty? Why was it made? The Osages recite in the treaty the causes which induced them to enter into it. This is what they say in the very first sentence:

"ART. 1. The tribe of Great and Little Osage Indians, having now more lands than are necessary for their occupation, and all payments to them from the Government under former treaties having ceased, *leaving them greatly impoverished*, and being desirous of improving their condition by disposing of their surplus lands, do hereby grant," &c.

These are good reasons. They had more lands than were needed for their occupation. But this was not all, for they go on to relate that all payments to them under former treaties have ceased, "leaving them greatly impoverished." Is it possible that these poor, penniless creatures, these indigent savages, whose pitiable condition could only be described by the word "impoverished," seriously contemplated a magnificent donation to aid in the building of railroads? But they not only confess their poverty, but they give as another reason for entering into the treaty, that they were "desirous of improving their condition." It was this desire which moved them to provide that the surplus money arising from the sale of the lands should be paid into the civilization-fund "for the education and civilization of Indians." They thought, perhaps unwisely, that education

and civilization would improve their condition. They therefore carefully provided for accomplishing that result.

It must not be forgotten that they required the lands to be sold for cash, and even went so far as to forbid homestead and pre-emption claims, because such claims would prevent their getting cash in hand. Is it possible that, after all these careful stipulations, they did not want cash at all, but desired to help the appellant build its railroad? Observe, also, the pregnant fact that when the Indians desired to make a donation, they carefully *expressed it in the treaty*. They took pains, also, to recite *why* they made it. For instance, in Article 3, they give a section to the Catholic mission of which Father Schoenmaker was the head, "being sensible of the great benefits they have received from said mission." They also permit Father Schoenmaker to select two more sections, on payment of one dollar and twenty-five cents per acre. In Article 6 they give Charles Mograin a section, "in consideration of the long and faithful services" rendered by him to the Osages. In Article 9, they remember the services of Darius Rogers, and give him the privilege of selecting a quarter-section on payment of a dollar and a quarter an acre. These donations and privileges are all carefully described and limited in the strictest manner, and the reason for making them proclaimed in the treaty. And yet the monstrous claim is now put forth that these same Indians, who were so parsimonious to those who had rendered them "long and faithful services," who only made donations upon good consideration, who were scrupulously particular to insert in black and white the reasons for making them; it is now asserted that they intended, by ratifying this "clumsily-expressed" amendment, to give away all their lands, without consideration, condition, or limitation! A

conclusion so absurd and unreasonable ought certainly to have something to stand upon more substantial than the awkward and ambiguous language of the Senate amendment.

It has been speciously urged by the appellant that the Indians would not be harmed by permitting the railroad to obtain a grant through these lands. The reason given for this assertion is, that by running the railroad through the lands they are greatly increased in value, and that the railroad can take the odd sections, leaving the even ones to be sold, according to the treaty, "for cash," and that they will sell for more than both odd and even without the railroad. This is a very cunning and ingenious argument. It has an appearance of candor and fairness well calculated to deceive. It says, in effect, "Certainly the treaty must be observed, the lands must be sold on the most advantageous terms for cash, but the most advantageous terms will be realized by running the railroad through, thus greatly enhancing the value of the land." The answer to all this—and it is an answer which strips it bare—is this: There are two roads running through these lands, having equal claims, but they run so near each other that their pretended grants overlap; and as they cannot both take the odd sections, one takes the even for indemnity—*thus between them taking the whole.* Comment is unnecessary.

Where, then, does the appellant get its prétended grant? Is it by the act of 1863? We have seen that the act of 1863 does not make a grant through these lands. Does it obtain it by the treaty? Clearly not, for the treaty provides for an entirely different disposition of the lands. Is the Senate amendment a grant? No rule of construction can give it that effect. Where, then, is the defendant's grant through the Osage lands

to be found? There can be but one answer: NO SUCH GRANT EXISTS.

THE JOINT RESOLUTION OF APRIL 10, 1869.

As if to finally dispose of the claims of railroad companies to a grant through these lands, Congress, on the 10th day of April, 1869, passed a joint resolution for their disposal. A joint resolution has the same force and effect as an act of Congress. It *is* an act of Congress, and, like any other act, becomes, upon its adoption and approval, the law of the land. The joint resolution is as follows:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That any *bona-fide* settler, residing upon any portion of the lands sold to the United States by virtue of the first and second articles of the treaty concluded between the United States and the Great and Little Osage Indians, September twenty-ninth, eighteen hundred and sixty-five, and proclaimed January twenty-first, eighteen hundred and sixty-seven, who is a citizen of the United States, shall be, and is hereby, entitled to purchase the same in quantity not exceeding one hundred and sixty acres, at a price of one dollar and twenty-five cents per acre, within two years from the passage of this act, under such rules and regulations as may be prescribed by the Secretary of the Interior: *Provided, however*, That *both the odd and even numbered sections* of said lands shall be subject to settlement and sale as above provided: *And provided further*, That the sixteenth and thirty-sixth sections in each township of said lands shall be reserved for State school purposes, in accordance with the provisions of the acts of admission of the State of Kansas: *Provided, however*, That nothing in this act shall be construed in any manner affecting any legal rights heretofore vested in any other party or parties.

"Approved April 10th, 1869."

By this resolution every foot of these lands is declared

to be subject to settlement and sale. It may be said that this is in violation of the treaty, which forbids homestead and pre-emption claims. Very well. But it by no means follows that because Congress, by express act, may violate the provisions of a treaty, that the Secretary of the Interior may do so without any act. An act of Congress may be valid though it violates treaty stipulations. (*The Cherokee Tobacco*, 11 Wallace, 621.) But the fact that Congress, by this joint resolution, has violated the treaty in favor of settlers, does not authorize an officer of the Government to violate it in favor of the appellant. The resolution ordains that any bona-fide settler shall have the right to purchase. But it does not stop there. It goes on to provide that "*both the odd and even numbered sections of said land shall be subject to settlement and sale as above provided.*" It would seem that Congress had the claims of railroad companies specially in view when these words were inserted in the joint resolution. What other reason could there have been for declaring that odd as well as even sections should be subject to settlement? True, there is a proviso that the joint resolution shall not affect vested rights. But we have shown that there *were* no vested rights in favor of the defendant in these lands, and a proviso protecting vested rights cannot be construed to create any. What vested rights, then, are saved by the proviso? Why, simply the rights of the donees in the treaty, whose "long and faithful services" had been remembered, viz: Father Schoenmaker, Charles Mograin, and Darius Rogers. It did not need a proviso to save their rights, but it was no doubt inserted, as provisos often are, to save doubt and prevent litigation. The appellant claims that this proviso saves its grant from the operation of the joint resolution. It will be remembered that the appellant's counsel in discussing the

proviso of the act of 1863 argued that "provisos must be strictly construed against those claiming under them," and that those who claim under provisos must clearly show that they come within them. Now let us apply that doctrine to this proviso saving vested rights. Can the appellant "clearly show" that it had vested rights to be saved? It cannot, unless it can "clearly show" that the act of 1863 gave it a grant of these Osage lands. But not only is it impossible to clearly show that the act of 1863 made a grant of these lands, but we have clearly shown that it did *not*. Therefore it had no vested rights in these lands when the joint resolution was passed.

The resolution was an invitation to settlers to come upon the lands, and they came by thousands. Counsel have said they came as trespassers, with notice of the rights of the railroads. This is a purely gratuitous assertion and assumes the whole question at issue. You cannot charge them with notice of the appellant's rights if it had none. One thing is certain, these settlers were permitted by the Government to enter 314,220 acres of these lands. The officers of the local land-office received their money, $454,072.10, and gave them the duplicate receipt which is the evidence of an entry and sale. Now, how can it be said that these settlers had notice of the rights of the appellant when the officers of the Government had not? These entries, so made by settlers in good faith, have many of them been canceled; others were being canceled when this suit was instituted. They were canceled, not because the settlers had notice of the appellant's rights, but because the Secretary of the Interior had decided that by virtue of the act of 1863 (and its recognition by the Senate amendment to the treaty) the lands had been granted to aid in the construction of railroads. There is no room for settlers if the appel-

lant's claim is valid. Substantially the railroads take all or none. I submit that they can take none.

THE THAYER ACT.

Nothing better illustrates the weakness of the railroad claim to the Osage lands than the desperation with which they grasp at such straws as the act changing the line of road south of Thayer. The appellant, desiring to relocate part of its road, secured the passage of an act of Congress permitting it to do so. The act is as follows:

"*Be it enacted*, That the Leavenworth, Lawrence and Galveston Railroad Company, for the purpose of improving its route and accommodating the country, may relocate any portion of its road south of the town of Thayer within the limits of its grant, as prescribed by the act of Congress entitled 'An act for a grant of land to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State,' approved March 3, 1863, not thereby to change, enlarge, or diminish said land-grant."

"This act," says counsel for appellant, "recognizes our grant. The town of Thayer is upon the Osage lands, and this act recognizes a grant south of Thayer." I have already remarked that recognizing a thing which has no existence will not bring it into existence. This Thayer act was passed in 1871. Long before that time the various acts, treaties, and joint resolutions bearing upon this question had gone into effect, and there either was or was not a grant. In either event the Thayer act could not affect the question in the slightest degree. Yet the counsel insists that it is a legislative construction in favor of their grant. That is to say, the Congress of 1871 construed an act passed by the Congress of 1863. But is this Thayer act a construction of the act of 1863? What is its object? Simply to authorize a change in the location of a railroad. It does not pro-

fess to construe any former act. It provides that the change of route shall not enlarge, diminish, or change the appellant's grant. If it neither enlarges, diminishes, or changes the appellant's grant, what *does* it do to it? Nothing.

But, after all, what does a legislative construction of a former act amount to? The province of legislatures is to pass laws; courts construe them. There is a Minnesota case, *Bingham* vs. *Supervisors of Winona County*, 8 Minnesota, 448, which briefly but conclusively disposes of this "legislative-construction" argument. In that case the question came up *whether a certain act was in force at a certain date.* To show that it *was* in force at the date in question, one of the counsel cited a subsequent act *repealing it*, and argued that the repealing act was a legislative recognition that it was in force up to that time, or else it could not be *repealed.* But the court said: "It it is further argued, by the appellant, that the legislature itself has given a construction of the section under which these fees are claimed, and which he deems conclusive. If the repeal of the statute named is to be regarded as a construction of that legislature to the effect that the statute was then in force, and that by virtue of it the treasurer was entitled to the fee therein named, this fact could by no means have the conclusive effect claimed for it by the counsel for the appellant. It is only the intent of the legislature which *enacts* the statute that is to govern the courts in the construction thereof. *The opinion of a subsequent legislature upon the meaning of a statute is entitled to no more weight than that of the same men in a private capacity.*" This opinion was a polite notice to all concerned that the services of a "subsequent legislature" were not required in assisting the court to perform its duties. See, also, *Dash* vs. *Van Kleeck*, 7 Johnson, 508, where the court intimates, with a quiet

but somewhat grim humor, that it would not be well for the legislature to attempt to usurp the judicical function of interpreting laws, which, as the court observed, "does and ought to belong exclusively to the courts of justice."

Now, what difference does it make what the Congress which passed the Thayer act thought about the act of 1863? Their opinion "is entitled to no more weight han that of the same men in a private capacity." How much weight with this court would the opinions of men "in a private capacity" have? None. Then, how much weight can this Thayer act have? None.

On the other hand, a great many people, both "in a private capacity" and as public officers, construed the act of 1863, and did not discover or "recognize" any grant in it of these lands. The Hon. Joseph S. Wilson, Commissioner of the General Land-Office, construed it, and on the 18th of April, 1867, in reply to the application of the appellant for these lands, said:

"With reference to the right of the company to odd sections within the limits of the lands ceded by the Osage Indians to the United States under the treaty proclaimed January 21, 1867, I would state: That the lands granted and sold to the United States by the first article of the treaty are to be disposed of at the most advantageous terms for cash. Hence, by the stipulations of the treaty, the railroad can acquire no rights whatever to the lands."

A month later, (May 17, 1867,) he again said, emphatically:

"In the opinion of this Office, the terms of the treaty, as above quoted, with the amendments, do not give the lands along the line of its route in aid of the construction of the road, but, on the contrary, are so comprehensive as to require all such lands to be sold in trust for the purposes specified in said treaty."

Secretary Cox said the same thing. So also did the President when he issued his proclamation for a sale of

these lands according to the treaty. Congress, by the joint resolution of April 19, 1869, denied the railroad claim. And lastly, the court below, by solemn decree, declared the patents issued to the appellant void.

Wherefore we claim:

First. That these Osage ceded lands having been set apart and reserved by competent authority for a special and particular purpose, and being so used and occupied, did not at the date of the act of March 3, 1863, constitute a part of the public lands of the United States. That, therefore, they would not and did not pass to the appellant by virtue of that act, and no exception or proviso was necessary to prevent them from so passing.

Second. That by the proviso to the first section of the act of 1863 these lands were clearly and positively reserved and excepted from the operations of the act.

Third. That by the treaty proclaimed January 21, 1867, these lands were ceded to the United States in trust, to be surveyed and sold by the United States, and the proceeds applied to certain carefully-designated purposes. That by said treaty the United States took the bare legal title to said land, and that in equity the Osage Indians were and are the owners thereof except so far as the Government has executed the said trust.

Fourth. That said treaty makes no grant to the defendant nor for its benefit.

Fifth. That the amendment to the treaty does not make a grant, nor recognize any; and if it did, such recognition would not make a grant where none existed before.

Sixth. That no grant having been made of the Osage lands to the appellant or for its benefit, its patents are void and ought to be canceled and held for naught.

GEO. R. PECK,
United States Attorney, District of Kansas.

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

THE LEAVENWORTH, LAWRENCE AND GALVESTON RAILROAD COMPANY, APPELLANT,
vs.
THE UNITED STATES.
No. 676.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Synopsis of argument for the United States.

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SYNOPSIS OF ARGUMENT FOR THE UNITED STATES.

BRIEF, 48.

PART I.

PRELIMINARY PROPOSITIONS.

PROPOSITION I.

When Congress makes a grant of defined lands to a State, to aid in the construction of a railroad, and officers are authorized to give evidence of title to a company having constructed it, if such officers undertake to give such evidence of title to lands not so granted, their acts are not merely voidable but absolutely void, and may be impeached collaterally.

1 Opinions Attorneys-General, 420.
2 Opinions, 186.
5 Opinions, 9.
Wilcox *vs.* Jackson, 13 Peters, 498.

State *vs.* Miller, 3 McLean, 151.
Stoddard *vs.* Chambers, 2 Howard, 284.
Brown *vs.* Clements, 3 Howard, 650.
Kissel *vs.* St. Louis School, 18 Howard, 18.
Minter *vs.* Crommelin, 18 Howard, 87; S. C., 9 Ala., 594.
Easton *vs.* Salisbury, 21 Howard, 431.
Hall *vs.* Gaines, 22 Howard, 144.
Lindsey *vs.* Hawes, 2 Black, 554.
11 Wheat., 388.
1 Black, 375.
Railroad Company *vs.* Smith, 9 Wallace, 96.
State *vs.* Bachelder, 1 Wallace, 109; 5 Minn., 223.
U. S. *vs.* Stone, 2 Wallace, 525.
Richart *vs.* Phelps, 6 Wallace, 160.
Jackson *vs.* Lawson, 10 Johns., 26.
People *vs.* Livingston, 8 Barb., S. Ct., 253.
Hunter *vs* Hemphill, 6 Miss., 106.
Perry *vs.* O'Hanlan, 11 Miss., 585.
Wright *vs.* Rutgers, 14 Miss., 585.
Hit-tuk-ho-mi *vs.* Walls, 7 S. & M., 363.
Gaston *vs.* Canada, 39 Mo., 357.
Acts 3d March, 1819; May 21, 1824; January 12, 1825; May 24, 1828; 1 Lester, 34, 36, 38, 40, 667.

BRIEF, 49.

PROPOSITION II.

Where officers, in executing laws relating to the disposal of the public lands of the United States, or of lands held in trust for sale, have, without authority of law, issued evidence purporting to convey the title to such lands, or where a grant of such lands is claimed by force of a law,

the United States may, in such cases, in their own name, by direction of the Attorney-General, maintain a bill in equity to cancel such evidence of title, and to enjoin claimants from asserting title.

O'Brien *vs.* Perry, 1 Black, 139.
Lindsay *vs.* Hawes, 2 Black, 554.
Bagnell *vs.* Broderick, 13 Peters, 436.
State of Minnesota *vs.* Bachelder, 1 Wallace, 115.
United States *vs.* Stone, 2 Wallace, 525–536.
Hughes *vs.* United States, 4 Wallace, 235.
Johnson *vs.* Towsley, 13 Wallace, 72–91.
Opinions Attorney-General Legare, November 26, 1842, 1 Lester, 659.
Seward *vs.* Hicks, 1 Har. & McHenry, 24.
Lord Proprietor *vs.* Jennings, idem, 92.
The King *vs.* Vernon, 3 Levine, 281.

BRIEF, 50–55.—PROPOSITION III.

The provisions of an act of Congress or of a treaty making a grant of lands, or authorizing a conveyance thereof, in the nature of a bounty, in aid of the construction of a railroad by a State or corporation, are to be construed most strictly against the grantee. Whatever is not given expressly, or very clearly implied from the grant, is withheld. If there be any doubt from any obscurity in the grant, it is to be resolved as conclusive against the grant.

The language of Indian treaties is not to be construed to the prejudice of the Indians. If a doubt arises, it is to be construed in their favor.

Opinion Attorney-General Black, Nov. 22, 1858.
Charles River Bridge *vs.* Warren Bridge, 11 Peters, 544.
Mills *et al. vs.* Saint Clair County, 8 Howard, 581.

Richmond Railroad Company *vs.* Louisa Railroad Company, 13 Howard, 81.

Perrine *vs.* Louisa Railroad Company, 13 Howard, 81.

Ohio Life and Trust Company *vs.* Debolt, 16 Howard, 435.

Southbridge *vs.* Whaley, 2 Barw. & Ad., 792.

Parker *vs.* Great Western Railroad Co., 7 M. & Gr., 253; 27 Pa., 339.

Dubuque and Pacific Railroad Company *vs.* Litchfield, 23 Howard, 88.

Geldart *vs.* Gladstone, 1 East., 675.

Rice *vs.* Railroad Company, 1 Black, 380.

United States *vs.* Arredondo, 8 Peters, 738.

Binghamton Bridge Case, 3 Wallace, 75.

Opinion Attorney-General, December 15, 1870.

Rules for construing proviso.—Brief 55–57–68.—If upon the *whole act* there is any doubt, the grant fails.

1 Black, 380; 23 Howard, 88.

The cases of the United States *vs.* Dickson, 15 Peters, 165, and Thornhill *vs.* Hall, 2 Clark and Finlay's House of Lords' Cases, 36, relate to the construction of a will and to salaries, in which cases courts adopt liberal construction.

Redfield on Wills, 420; United States *vs.* Morse, 3 Story R., 87.

These cases do not relate to land-grant acts. A proviso has especial efficacy in law, and if repugnant to the purview, "repeals it and stands as speaking the last intention of the law-makers." (Sedgwick on Construction of Stat., 62; Smith on Stat., 712; Sedgwick, 117; Dwarris, 514.)

RULES FOR CONSTRUING TREATIES.—BRIEF 57–59.

When a grant is claimed under an Indian treaty, the same rules of construction operate against it as against any other law.

But there is superadded to this the further rule that the language used in Indian treaties shall never be construed to the prejudice of the Indians. (Worcester *vs.* Georgia, 6 Peters, 582; 2 Opinions Attorneys-General, 467; The Kansas Indians, 5 Wallace, 737; 4 Mass. R., 144.)

Argument on the act of March 3, 1863.

BRIEF, 59.

PART II.

GENERAL PROPOSITION.

THE ACT OF CONGRESS OF MARCH 3, 1863, (12 Stat., 772,) MADE NO GRANT OF ANY OF THE OSAGE INDIAN RESERVATION.

The claim of the United States is:

I. *That, by the act of* 1863, *Congress intended only to dispose of lands which,* AT ITS DATE, *were "public lands," and so made a grant* IN PRÆSENTI absolute, and with no provision enlarging it in case the Indian title should be extinguished, and that this never was extinguished, but conveyed to the United States by treaty, to be sold for the benefit of the Indians.

II. That the clause which refers to the time "when the lines or routes of said road and branches are definitely fixed," and known as the "indemnity clause," has no reference to the time when the grant shall take effect, or when the proviso shall begin to operate, but only gives the right to "indemnity lands" and fixes the

time when the Secretary of the Interior shall select them.

On behalf of the railroad companies it has been urged, either—

I. That the act made a present grant of the fee, subject to the Indian right of occupancy, to be enjoyed when it was extinguished, or—

II. That it intended to grant such lands as might thereafter be public lands at the time "when the lines or routes of said road and branches were definitely fixed," and that, when so fixed, these lands were "public lands" of the United States.

BRIEF, 63–66.

WHAT ARE "PUBLIC LANDS?"

From this statement, it will be seen, it is a matter of importance to define what are "public lands" of the United States.

For the purposes of congressional grants in aid of railroads, in the form the acts have been passed, none of the Government lands are "public lands" but *those owned absolutely by the United States, in their own right, and for their own purposes, which have not been* "OTHERWISE DISPOSED OF," *or devoted to any purpose or use whatever, in pursuance of an act of Congress or of treaty stipulation, and which are held for disposition by public sale, private entry, or otherwise.*

5 Opinions, 578.
Spalding *vs.* Martin, 11 Wisconsin, R., 262.
Holden *vs.* Joy, 17 Wallace, 211.
Wilcox *vs.* Jackson, 13 Peters, 498.
Act July 26, 1866, sec. 9, brief, p. 31–65.

BRIEF, 66.

DIVISION I.

The last proviso of the act of 1863 *expressly reserves the Osage lands from the grant.*

SECTION 1. The words of the proviso "reserved for any purpose" were employed for the purpose of excepting Indian reservations from the grant.

The Osage treaty of 1825 reserves these lands for the use of the Indians, and the proviso to the act of 1863 was designed to preserve good faith under the treaty.

There was no other *reservation* to which the proviso could apply. It was the only one "*through*" which the railroad was to run.

BRIEF, 70.

SECTION 2.—*The proviso took effect at* THE DATE OF THE ACT, *and all lands* THEN *within its exception* CONTINUED FOREVER RESERVED.

It did not await a location of the road. This is so, *because :*

a. The act of 1863 made a grant *in præsenti*, as will be hereafter shown.

BRIEF 70–71.

b. "Every law takes effect on the day of its passage." (Matthews *vs.* Zane, 7 Wheat., 164; The Ann, 1 Gallison, 62; 1 Kent, 455; Sedgwick Stat., 2d ed., 67.)

"A statute referring to, or affecting, persons, *places*, or *things*, is limited in its operation to persons, places, and things as they existed at the time the statute was passed."—(U. S. *vs.* Paul, 6 Peters, 141; Hall *vs.* State,

20th Ohio, 16; Kendall *vs.* U. S., 12 Peters, 527; Mobile *vs.* Eslave, 16 Peters, 234; Mobile *vs.* Hallet, 16 Peters, 261; 9 Wallace, 95; 4 Bacon's Abr., 526.)

The *proviso* CAN and *does* operate from the date of the act. *It is in præsenti.*

A reservation excepting lands from a grant is quite different from *the* grant. A grant may be so made as to be inchoate— may take effect *in futuro*, but a reservation may operate absolutely at its date.

BRIEF, 72.

c. The *words* of the *proviso* make it take effect *at its date* and *continue perpetually.*

The law is "clear and explicit." It declares—

"That all lands heretofore *reserved* for any purpose be, and the same are HEREBY, reserved to the United States FROM THE OPERATION OF THIS ACT."

The Osage lands were theretofore reserved by the treaty of 1825.

BRIEF, 73.

d. The *object* of this statutory reservation or exception from the grant was to avoid *an Indian war* by a sale of lands in Indian occupancy, and to keep the Government in a position to dispose of the lands as justice to the Indians might require and the interest of settlers might demand.

BRIEF, 73.

e. But this question is placed at rest by repeated decisions of this court, on similar provisos, in all of which they are treated as operating from the date of the acts respectively.

BRIEF, 73.

SECTION 3. *But it is objected that the* PROVISO *cannot reserve these Osage lands from the grant because the treaty of* 1825 *had not previously reserved them* "TO THE UNITED STATES," but only to the Osage Indians.

a. This is not even good as a verbal criticism. As applied to the Osage lands it may, as a question of grammar, be read as italicised above—

"That all lands heretofore reserved * * * in any manner by competent authority, (treaty of 1825,) for any purpose whatsoever, be and are hereby reserved," &c.

b. The verbal criticism is bad again because it would leave the proviso without any effect at all. It must apply to the Indian reservations or nothing. "Effect, if possible, must be given to every clause." (Sedgwick Stat., 2d ed., 200, *n.*)

BRIEF, 75.

c. This verbal criticism is bad, because this court has so decided. (Wollcott *vs.* Des Moines Navigation Co., 5 Wallace, 681; Williams *vs.* Baker, 17 Wallace, 144; Railroad Co. *vs.* Fremont Co., 9 Wallace, 89; Railroad Co. *vs.* Smith, 9 Wallace, 95; 5 Opinions, 578, 10 Stat., 28.)

d. The Osage treaty of 1825 did reserve lands "to the United States."

The treaty declares that—

"Said reservation shall be surveyed and marked at the expense of the United States, and upon which the agent for said tribes or nations and all persons attached to said agency, as also such teachers and instructors as the President may see fit to authorize and permit, shall reside, and shall occupy and cultivate, without inter-

ruption or molestation, such lands as may be necessary for them."

BRIEF, 77.

SECTION. 4. *The uniform usage proves that the Osage lands were excepted from the grant.*

The claim of the Railroad Company is, that the grant attached to these lands because, "when the line of road was definitely fixed" *they were then public lands;* that is, that the treaty, proclaimed January 21, 1867, removed "their Indian title and character" and made them "public lands."

But these were not "public lands."

The Railroad Company *would be in a better position to claim a grant, if the Osage treaty, proclaimed January* 21, 1867, *had been made prior to the act of March* 3, 1863.

But even then it could claim no grant.

This has been decided in a similar case.

Attorney-General opinion of August 7, 1852, (1 Lester, 516; 5 Opinions, 603.)

BRIEF, 78.

SECTION 5. *This construction of the proviso is confirmed in the "indemnity clause."*

a. The indemnity clause gives lands outside of the ten-mile limits and within twenty miles, in lieu of those sold by pre-emption, &c., out of those "*granted as aforesaid.*" That is, *previously* granted by the prior granting clause. The proviso excepted the Osage lands from being "granted as aforesaid." There could be no indemnity, then, in lieu of the Osage lands.

In Railroad Company *v.* Fremont Company, 9 Wallace, 94, the court construed the railroad land-grant act of

May 15, 1856, (11 Stat., 9) similar to the act of 1863, and said:

"The reservations annexed to it are very full and explicit. They are first found *in the enacting clause itself*, where provision is made for the selection of lands beyond the lines of the six sections on each side of the road, in case any of the sections have been *previously* 'sold or OTHERWISE DISPOSED OF,' and then *again in the general* PROVISO *to the grant.*"

Here it is explicitly said that lands "*otherwise disposed of*," at the date of the act, (as by treaty reservation,) do not pass by the grant. Those lands were "otherwise disposed of," both by the treaty of 1825 and 1867.

b. Indemnity lands can only be selected "from the public lands of the United States." The proviso excepted all others from the grant. The indemnity clause and the proviso, then, harmonize in their purpose to apply the grant only to *such lands as were public lands at the date of the act.*

BRIEF, 79.

DIVISION II.

The act of 1863 *made a grant* IN PRÆSENTI *in the lands not excepted from the operation of the act. This was not of a fee, subject to the Indian right of occupancy, but of a perfect title. Hence the grant was not intended to include the Osage lands not then owned by the United States.*

SECTION 1. *The language of the grant and the authorities prove the grant was* IN PRÆSENTI.

The first section of the act contains three distinct parts: first, the "enacting" or granting clause; second,

The exception of lands "otherwise disposed of" in the "indemnity clause" excludes from grant all lands so "otherwise disposed of when the line of road is definitely fixed"

The proviso must have some other purpose. It excepts lands "otherwise disposed of" by treaty as Indian reservations &c at the date of the act

the "indemnity clause;" and, third, the *provisos*. Each part has its purpose. The object of the first is to make a railroad-grant. The language is:

"That *there be, and is hereby*, granted to the State of Kansas for the purpose, &c., * * * of a railroad, &c., * * * every alternate section of land designated by odd numbers for ten sections in width on each side of said road."

This language has been judicially construed, and it is decided that it *vests a present right.*

Opinions, 257; 11 Opinions, 47; Railroad Company *vs.* Smith, 9 Wallace, 95; Burlington and Missouri Railroad Company *vs.* Fremont County, 9 Wallace, 89–99; Rice *vs.* Railroad Company, 1 Black, 359; Rutherford *vs.* Green, 2 Wheat., 196; 1 Lester, 512, 523, 537, 549, 564; 2 Lester, 386; Armstrong *vs.* Morrell, 14 Wallace, 120; Schulenberg *vs.* Harriman, Supreme Court U. S., Oct. term, 1874; Lessieur *vs.* Price, 12 Howard, 56; Glasgow *vs.* Hortez, 1 Black, 595; Wolcott *vs.* Des Moines County, 5 Wallace, 681; Allison *vs.* Halfaire, 11 Iowa, 451; Fore *vs.* Williams, 35 Miss., 533.

The act *did* pass the title at its date, for there is not one word in it *relating to the subject of a grant*, which looks to a *future grant.*

BRIEF, 85.

SECTION 2. *A grant* IN PRÆSENTI *could not be intended to include the Osage lands.*

This would enable the Railroad company to locate a road in a month, and disregard the obligation of the treaty of 1825.

BRIEF, 86.

SECTION 3. *The act of* 1863 *did not grant the Osage lands, because the Government did not then own them.*

In 1863 there were *two titles* to this land: the *fee* in the Government; the *perpetualright of occupancy* in the Indians, as sacred as the fee. *This could not go to a Railroad company without the consent of the Indians, and they did not consent.* It will scarcely be claimed that the Government intended to grant a fee *cum onere;* for the Indians could *forever* determine what should be done with *their title.*

And the Government *did not* and *could not* by the act of 1863 make a *present grant* of the *Indian title*, which it *did not own.*

Legislative grants are not warranties, and do not pass an *after-acquired title.* (Rice *vs.* Railroad Company, 1 Black, 358; 1 Ld. Raym, 729; 12 Johns., 201; 13 Johns., 316; 4 Bibb, 436; Bond *vs.* Swearinger, 1 Ohio, 402 Allen *vs.* Parish, 3 Ohio, 116; Herman's Law of Estoppel, 256–294.)

The acts of 1863 and 1866 contain no covenant. The Government would not be estopped if they did.—(Herman on Estoppel, 256–295.) Polk's Lessee *vs.* Wendell, 9 Cranch, 99; Same case, 5 Wheaton, 303; Patterson *vs.* Winn, 11 Wheaton, 388.)

The act of 1863, then, could not grant *the perpetual Indian title* or *right of occupancy*, and Congress manifestly did not intend to grant a *naked fee which migh not be enjoyed for a century*, if ever, *and leave a perpetual right of occupancy to remain in the Indians or be sold by their treaty to others.*

SECTION 4. *There is no grant of a fee subject to the Indian right of occupancy.*

It cannot be said that the act of 1863 grants the fee of the lands, and that the railroad company takes it *cum onere*—that it is a grant subject to the Indian right of occupancy, and therefore no violation of the treaty. This is certain for many reasons.

a. The act grants a right of way through the reserved lands "subject to the approval of the President." This approval was required, so that the President might, as he did in the treaty proclaimed January 21, 1867, secure it before it could be enjoyed.—(Article 11.) Now, if the act of 1863 had been designed to secure *any other rights* in the Osage reservation, it would have so provided. The provision as to right of way shows that no other right was to pass to the railroad company.

b. A grant *cum onere* was not intended, because it does not say so.

The act of 1866 does make a grant of lands in the Indian Territory, contingent on two conditions, (1,) that "the Indian title shall be extinguished," and, (2,) "provided that said lands become a part of the public lands of the United States."—(See p. 31 of brief, sec. 9.)

And see act July 2, 1864, (13 Stat., 365.)

Where a grant is made in *general terms*, and there are *public lands* to which it can apply, it is never held to include the fee of lands subject to the Indian right of occupancy, except when, in the granting act, or its manifest object, there is something to show such purpose, as in cessions by treaty from one nation to another, and other like cases.—(Jackson *vs.* Potter, 1 Paine, 472.)

Even then the law of nations protects rights of property, including the Indian right of occupancy.—(United States *vs.* Percheman, 7 Peters, 51; 8 Stat., 258; 8 Stat., 202; 9 Stat., 930.)

BRIEF, 88.

SECTION 5. *The usage under all railroad land-grant acts proves that they do not grant the fee subject to the Indian right of occupancy, or in any form at any time.*

There is great value in the common understanding and opinons uniformly entertained by those who administer laws and all interested through a long series of years. "*Contemporanea expositio est fortissima in lege.*"—(Sedgwick, 213; Dwarris, 562; 53 Pa. St., 61.)

In all the years from 1850 *to* 1875 *no railroad company ever claimed any of the Indian reservations along the lines of these roads or that under any circumstances a grant could attach to them*, except only in the one case of these Osage lands.

In Kansas alone there have been grants for 22 roads, with 51 Indian reservations, existing at the dates of the granting acts, covering millions of acres of land.

It was always perfectly well understood that none of the Indian reservations ever inured to the grants, "*no matter at what* date the disposal was made."

Yet, if the fee passed by the land-grant acts, or a right to the fee, *present* or *prospective*, then it would be violated by a subsequent treaty sale of the *whole* title—the Government fee and the Indian perpetual right of occupancy. The treaty sale would, in fact, be void as to the fee. But all treaty sales have included a perfect title.

If, now, all this understanding of the law, which has prevailed for twenty-five years, is reversed, it will de-

stroy titles to millions of acres of lands sold by treaties and laws both before and after the "lines of roads were definitely fixed."

BRIEF, 93.

SECTION 6. *The "indemnity clause" proves the grant was* IN PRÆSENTI.

It gives lands to the Railroad Company outside of the ten-mile limit in lieu of those sold by pre-emption, &c., out of those "granted as *aforesaid.*"

There were, then, no lands granted but those "granted as aforesaid." The indemnity clause made no grant.

The lands "granted as aforesaid" were granted before any location of the road. *The location had no effect on the grant*—for all the lands were granted "*as aforesaid.*"

BRIEF, 93.

DIVISION III.

The general terms of the grant in the act of 1863, *independently of its* PROVISO *exception, were not designed to apply to any lands but those which were "public lands," at its date, and hence the Osage lands, not then being "public lands," did not fall within the grant.*

SECTION 1. *The act of* 1863 *shows a general purpose, by its own language, to deal only with "public lands," in making a grant. It names* THESE *as subject to the grant, and, by necessary implication, excludes all others.*

a. It will not be denied that the act of 1863 does deal with the "public lands" and makes a grant in them.

There is an immense grant of such lands, originally designed to extend from Lawrence to the north line of

the Osage reservation. The act does not show a purpose to deal with two different kinds of lands.

b. The "indemnity" clause of section one shows that none but "public lands" fell within the grant.

Here it will be seen indemnity selections could only be made of "THE PUBLIC LANDS of THE UNITED STATES."

The lands granted must be of the *same kind*, because the indemnity lands were between the ten and twenty-mile limits, and were therefore necessarily of the same kind—all "public lands," lands "nearest to tiers of sections *above specified*."

They were lands *in which there could be homestead* settlements and pre-emption entries. None but "public lands" are subject to such settlement or entry. The pre-emption act of September 4, 1841, (5 Stat., 455, sec. 10,) expressly excepts "lands included in any reservation by any treaty," just as does the *proviso* to the act of 1863.

c. The lands granted were such as "shall be *disposed of* as the work progresses *through* the same."

The State was authorized to sell absolutely the lands. It is incredible to believe that Congress, in the act of 1863, agreed to grant the Osage lands; for, if so, they might be "disposed of" by the State in a month, and thus utterly disregard the Indian title, and the obligations of the treaty of 1825.

d. The lands granted were only such as Congress intended to agree that a railroad might be made through in a month. But Congress could not have intended any such thing as to the Osage lands.

This would violate the Indian rights and the treaty of 1825.

Congress refused to grant a right of way without the "assent of the President," so that it might be secured by treaty.

Congress could not have intended to give a right to sell the lands. By the act of June 30, 1834, (4th Stat., 730, sec. 11,) it was made a crime to *survey* or *settle* on this reservation, and that law is yet in force.

The act of 1863 makes no repeal of it. Repeals by implication are not favored.

SECTION 2. *The Osage lands were excluded from the granting clause in the act of* 1863 *by* PRIOR *treaties, statutes, and the general policy of the Government.*

a. The Indian title is as sacred as the fee. (U. S. *vs.* Cook, 19 Wallace, 593; Cherokee Nation *vs.* Georgia, 5 Peters.) The lands were reserved from grant by treaties. (Treaty of 1825, 7 Stat., 240.) These lands were reserved by the treaty of 1825.

b. They were equally reserved by the policy of other laws not repealed by the act of 1863.

Act of June 30, 1834, "to regulate trade and intercourse with the Indian tribes," &c., (4 Stat., 729, sec. 11.)

The act of January 9, 1837, (5 Stat., 135,) sanctified a policy of selling *all* lands which might be ceded by Indians, both the Government fee and the perpetual Indian right of occupancy, and of investing the money for their benefit.

The pre-emption act of September 4, 1841, (5 Stat., 456, sec. 10,) preserved this policy.

It declares that—

"No lands included in any reservation by any treaty, *to which the title* has been or *may be extinguished* during

the operation of this act, * * * shall be liable to entry under * * * this act."

BRIEF, 99.

d. The policy of this act of Congress has been uniformly carried out in our Indian treaties.

Chickasaw treaty, May 24, 1834, 7 Stat., 450; Opinion of Attorney-General, August 17, 1852; 5 Opinions, 603; 1 Lester, 516.

The treaties making sales for the benefit of Indians are collected in the recently-published volume of Indian treaties, 347, 450, 686, 691, 839, 5 Stat., 135; 12 Stat., 1111, 1240; Holden *v.* Joy, 17 Wallace, 211; Otoe treaty, March 15, 1854, 14 Stat., 687, 794; Joint Res., April 10, 1869, 16 Stat., 55; House Ex. Doc. 179, 2d sess. 41st Cong.; Letter Sec. War, May 3, 1870; Globe, Pt. V, 2d sess. 41st Cong., 4159, 4135; Clark's speech, House, January 13, 1869; Globe, vol. 2, 2d sess. 41st Cong., p. 1579. And this policy was recognized and admitted by Congress, March 1, 1871, by a clause in a conference-committee report put on the Indian appropriation act of March 3, 1871, *prohibiting all such treaties.* But Congress has since by law carried out the former policy treaty. (Act July 15, 1870, 16 Stat., 362, sec. 12; Wood *v.* M. K. & T. Railroad Co., 11 Kansas, 347.)

e. Congress has regarded the Osage Indians as having the *absolute* ownership in their reservations, at least so far as to require them to be sold for their benefit. The act of July 15, 1870, (16 Stat., 362, sec. 12,) refers to them as "the lands of the said Indians;" and the joint resolution of April 10, 1869, (16 Stat., 55,)

refers to them as "the lands sold to the United States by virtue of" the treaty, &c.

f. The authorities make it clear that the history of legislation in reference to any subject-matter of general interest may be referred to to aid in the construction of a statute.—(Sedgwick, 2d ed., 214; Henry *vs.* Tilson, 17 Vermont, 479.)

And the decisions of this court show that where Congress has, by its legislation, adopted a general policy, this forms a basis for construing statutes and declaring what the law is.—(Planters' Bank *vs.* Union Bank, 16 Wallace, 483; Joy *vs.* Holden, 17 Wallace, 211.)

BRIEF, 111.

SECTION 3. *Congress did not intend, by the act of* 1863, *to make a grant in the Osage lands, because this would have compelled the Government to negotiate with the Indians to extinguish their title, not at its own convenience, but when the railroad company required, and it would have taken from the Government the usual means of doing so.*

1. The usage of the Government, in our numerous Indian treaties, has been to provide for a sale of the Indian lands, and, *with the proceeds*, purchase for the Indians a new home, and invest the residue in Government bonds, and with the interest thereon pay them annuities, and thus support them.

In order to do this, it has been found necessary to make grants of select lots of land to Indians who chose to adopt the habits of white men, to men who had rendered services to the Indians, to religious societies or missions located among them, for schools, &c. Now, if the act of 1863 made a grant in these lands, this whole

policy, pursued in all other cases, would have been defeated.

It is incredible to believe that Congress, during the rebellion when greatly in need of money, by the act of 1863, intended to surrender the means adopted generally in treaties for securing a cession of the Indian title.

The treaty itself, by disposing of *odd sections*, is a denial of any railroad grant.

BRIEF, 114.

SECTION 4. *But it is settled on authority, that the act of* 1863 *cannot as a question of legislative intent be construed to apply to the Osage reservation.*

Wilcox *vs.* Jackson, 13 Peters, 498.

Spalding *vs.* Martin; State *vs.* Delesdenier, 7 Texas, 76; 5 Opinions, 118.

Stoddard *vs.* Chambers, 2 Howard, 248; Vincennes University *vs.* Indiana, 14 Howard, 268; Easton *vs.* Salisbury, 21 Howard, 426; 2 Opinions, 186.

There have been cited in opposition to these views, 8 Opinions, 255; 9 Opinions, 346; 1 Lester, 505; Jackson *ex dem* Sparkman *vs.* Porter, 1 Paine, 458–472.

None of these could overrule the weight of reason and authority in the cases cited, but they do not necessarily conflict, since they all turn upon a question of legislative intent.

The case in 8 Opinions, 255–8, was on a statute totally unlike the act of 1863.

The opinion of Attorney-General Black, in 9 Opinions, 346; 1 Lester, 505, was on a statute which had *no proviso exception*, as in the act of 1863, and is to be read in connection with the authorities already cited, (brief, 231.)

The case of Jackson *ex dem* Sparkman *vs.* Potter, 1

Paine, 457–472, only treats of the nature of the Indian title, and the *power of Congress* to dispose of the fee, but *construes no law* making any grant of lands.

BRIEF, 121.

SECTION 5. *General rules of construction require the act of* 1863 *to be construed as making no grant of the Osage lands.*

This view of the act of 1863 is required by two well-known rules of construction. These are—

1. That "statutes *in pari materia* are to be taken together as if they were one law," in order to ascertain the sense of each. (Sedgwick, Stat., 210, 2d ed.)

2. That "repeals by implication are not favored—a general statute, without *negative* words, will not repeal the particular provisions of a former one, unless the two acts are *irreconcilably inconsistent.*" (Sedgwick, 98.)

Here are the treaty of 1825, the act of 1834, the act of 1837, the act of 1863, the opinion of the Attorney-General, the ruling of the Supreme Court, the usage of all treaties. These were all laws, or had assumed the effect of existing laws. They are *in pari materia*, because, as Sedgwick says, (p. 211,) they are "general laws made at different times and in reference to the same subject." No one contains any *negative* on any other, and hence there is no *express* repeal. They are not "irreconcilably inconsistent," because *effect can be given to each* without defeating any other, and there is therefore no repeal by implication.

Hence, all must be construed together, so that even the *policy* or *purpose* of any one shall not be interfered with by any other. This cannot be done if the act of 1863 makes a grant of these lands. That would operate as a repeal of all this policy and these laws.

SECTION 6. *The omission of any provision in the act to determine how the lands should be divided between the two railroad companies is evidence that no land-grant was intended in these lands.*

There were two companies claiming a grant under the act of 1863. They would necessarily conflict. This conflict led to the contest of 1870, before the Secretary of the Interior, finally settled by a compromise.

BRIEF, 123.

SECTION. 7. *The purpose of Congress not to make any grant of the Osage lands, by the act of* 1863, *is shown by reference to other laws.*

Wherever Congress intended *that a present* or *future grant* should be operative, in an Indian reservation in any contingency, express provision has been made accordingly.

Act of July 26, 1866, (14 Stat., 289, secs. 8, 9, 10;) act January 29, 1861, (12 Stat. 126,) proviso; act July 2, 1864, (13 Stat., 367, sec. 2.)

The act of March 3, 1863, (12 Stat., 772,) and the Osage treaty proclaimed January 21, 1867, (14 Stat., 689,) show that no rights in the Osage reservation were to pass to railroad companies, *after the Indian title should be extinguished*, but those specifically named.

The proviso to the act of 1863 reserved all Indian reservations "from the operation of the act." The treaty was not a repeal of the proviso. The proviso continued *after the treaty* to reserve the Osage reservation from the operation of the act in making a grant.

BRIEF, 127.

DIVISION IV.

The "indemnity clause" of the act of 1863 *does not make*

a future grant of lands "reserved" from grant at its date. Its purpose was not to make or affect the *grant* at all.

The claim of the railroad company is, that, by delaying the location of the road, lands became subject to a grant which were not so when Congress passed the granting act.

SECTION 1. *The improbability of this claim.*

It is extremely improbable that Congress would offer a premium for delay in making a railroad. The act of 1863 required the road to be completed within ten years.

SECTION 2. *The* PURPOSE *of the "indemnity clause" shows no enlargement of the grant was intended by delay.*

The first section of the act of 1863 is divided into three essential parts:

I. The "enacting" or granting clause;

II. The "indemnity clause;" and,

III. The *provisos*, or excepting clauses.

Each of these performs a distinct office.

The object of the first is to make a grant of "public lands."

The third clause or clauses perform a double function:

1. The *unnecessary*, but common and proper office of avoiding controversy, by giving notice of what the law already implied, that lands otherwise appropriated should not pass by the granting clause; and

2. It performed the really *effective office* of declaring that "the right of way only should be granted, subject to the approval of the President," in the reserved lands. That is, it can at most only have this effect, if the provision for right of way can apply to *all* the *reserved* lands, including the Osage lands. It is probable this

clause as to right of way should be construed as only giving a right of way through the reserved lands that might be taken by pre-emption settlement or homestead entries.

The "indemnity clause" intervened between the grant and the provisos.

Now, to understand the purpose of this, it is proper to refer to other existing laws.

The act of July 22, 1854, (10 Stat., 310, sec. 12,) and the act of March 10, 1854, (10 Stat., 269,) made all "public lands" subject to pre-emption under the act of September 4, 1841, (5 Stat., 455, sec. 10.) The homestead act, May 20, 1862, (12 Stat., 392, sec. 1,) subjected the "public lands" also to homestead entries.

Time would often elapse *between the date of a grant* and the certified location of a road, and in the *mean time* "the right of pre-emption or homestead settlements" would attach to the lands "granted as AFORESAID;" and the lands might otherwise be disposed of, or might previously have been reserved for some purpose, and in all such cases Congress, by the "indemnity clause," intended to provide that indemnity lands, in lieu of those so disposed of, might be selected between the ten and twenty mile limits.

8 Opinions, 246; 1 Lester, 513; Railroad Co. v. Fremont Co., 9 Wallace, 94.

This proceeds upon the idea that the beneficiary *railroad company has a right to all the odd sections within the grant at the* DATE OF THE ACT, or an equivalent in indemnity lands. The equivalent is given for the loss of lands after the right accrued at the date of the act. For *if no right attached* until the location of the road-then there could exist no claim for indemnity.

The *indemnity* is for a *lost right*, and *if no right exists until the location of the road none could be previously lost*, and there could be no right to indemnity lands.

The real purpose of the "indemnity clause," then, was—

I. To give lands outside of the ten-mile limits as indemnity for those lost inside by pre-emption sales, &c., between the date of the granting act—that is, between the *date of the grant*—and the location of the road.

II. To determine *the time when* homestead entries and pre-emption settlements should cease, and the selection of indemnity lands should be made. These pass by selection; the lands granted "*in place*" pass *by the grant* without selection.

BRIEF, 134.

SECTION 3. *The indemnity clause* MAKES NO GRANT, *and hence no enlargement of the prior grant by delay.*

The effect of the act may be ascertained by supposing the indemnity clause to be omitted. It will then read (omitting immaterial parts) as follows:

"That there be, and is hereby, granted to the State of Kansas, for the purpose of aiding in the construction of a railroad from the city of Leavenworth, by way of the town of Lawrence, to the southern line of the State in the direction of Galveston Bay, in Texas, *every alternate section of land, designated by odd numbers, for ten sections in width on each side of said road: Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or* [reserved] *in any other manner by competent authority, for the purpose* of aiding in any object of internal improvement, *or for any other purpose*, be, and the same are hereby, reserved to the United States from the operation of this act, except," &c.

SECTION 5. *The usage under other statutes shows that the extinction of the Osage title could not extend the grant to the Osage reservation.*

The pre-emption act of September 4, 1841, (5 Stat., 453, sec. 10,) gave the right to make pre-emption settlements and sales. It contains exceptions (substantially in effect like the proviso to the act of March 3, 1863) which exclude certain lands from pre-emption.

It has never been supposed that if any of these excepted lands should lose the specified character, they would *ipso facto* become subject to pre-emption.

As to them the principle has been applied, *once excepted always excepted.* Wilcox *vs.* Jackson, 13 Peters, 498; Spalding *vs.* Martin, 11 Wisconsin, 262.

If lands *ceased* to be "included in any reservation," they did not *ipso facto* fall within the *grant* of the right to pre-empt.

On the contrary, they could only be made so by law. And hence it was that when Kansas, Nebraska, and New Mexico were about to be opened up to settlement, Congress, by act of July 22, 1854, (10 Stat., 310, sec. 12,) expressly provided "that all lands to which the Indian title *has been* or *shall be* extinguished within said Territories of Nebraska and Kansas, shall be subject to the operations of the pre-emption act of fourth September, 1841," &c.

The uniform ruling of the Interior Department has been that where pre-emption entries exist at the date of a railroad grant, and afterward become forfeited for non-payment, &c., they *continue excepted from the grant* forever after. They do not fall within the grant. They revert to the public domain as a part of it.

(See Boyd's appeal, brief, 231.)

To hold otherwise would subject to railroad-grants, school-lands, military reservations, Indian reserves, sites of forts, light-houses, custom-houses, and all lands (to use the language of the proviso in the act of 1863) "heretofore reserved to the United States by any act of Congress, or by competent authority for any purpose whatsoever," whenever they may cease to be reserved for any of said purposes.

This would destroy the titles to millions of acres of land.

BRIEF, 137.

SECTION 6. *The* PROVISO *to the act of* 1863 *would except the Osage lands from any words of the "indemnity clause" or any other operations of the act which are claimed to extend the grant to after-acquired lands.*

If by any construction of the words of the "indemnity clause" standing alone, or in connection with the prior granting clause, they might be so applied to the Osage lands as to make a grant therein whenever the Indian title might be extinguished and they became "public lands," yet all this would be subject to and limited by the *proviso*, and it would except them from such a grant.

By the proviso the Osage lands are "reserved *from the operation of this act.*"

They are *reserved* from *every operation* of the act.

But this question is settled. In all the cases construing the proviso the court has treated it as operating at its date. These cases have already been cited.

SECTION 6. *The proviso continued operative on the Osage lands after the treaty of* 1867.

The treaty did not repeal the proviso. The proviso, then, continues to except from every "operation of the act" all these Osage lands.

The treaty of 1825 reserved the lands.

The treaty proclaimed January 21, 1867, *continued the reservation*, and directed another disposition of the lands for the benefit of the Indians. It was a reservation within the meaning of the proviso.

If lands are devoted to sale "under existing laws," they are reserved from a railroad grant.

And these lands were by the treaty "otherwise appropriated," and so, within the express terms of the "indemnity clause," saved from any grant.

SECTION 7. *A conditional grant to take effect upon the happening of a contingency is never made, unless such purpose is clearly expressed. It is not so expressed in the act of* 1863, *and the alleged grant fails.*

It has already been shown that when any such contingent grant was intended, the purpose has been expressed in clear terms, as in the act of July 26, 1866, &c. (14 Stat., 289, sec. 9; this brief, p. 31; act January 29, 1861, 12 Stat., 126; act July 2, 1864, 13 Stat., 367, sec. 2.)

BRIEF, 140.

SECTION 8. *The Osage lands never became "public lands." The Indian title was not extinguished. Hence the "indemnity clause" could not extend the grant to them.*

A. It has already been shown that lands conveyed by Indian treaty to the United States to sell for their benefit are not "public lands."

B. But the Osage treaty, proclaimed January 21, 1867,

does not leave this in doubt. It cedes these lands to the United States, and then declares that—

"Said lands shall be surveyed and sold * * * *as public lands are surveyed and sold* under existing laws."

The effect of this is to say that they are *not* "public lands," but that they shall be sold in the same manner as if they were such lands.

BRIEF, 141.

C. *The Indian title was not extinguished, and hence no grant could attach to these lands.*

The treaty of 1867 conveyed the land to the United States to sell, and this, in legal effect, created a trust. It could *then dispose of the perpetual Indian title,* for this *never had* gone to any railroad company, *and could not* without the consent of the Indians. Rice *vs.* Railroad Co., 1 Black, 358–381; Perry on Trusts, 248; 2 Hill on Real Property, 467, [192,] 618, [325,] [182,] 455.

SECTION 9. *The "indemnity clause," as well as the proviso, reserved these lands from any railroad grant both before and after the treaty of* 1867.

The treaties "otherwise disposed of" these lands. *Railroad Co.* vs. *Fremont County,* 9 Wallace, 94.

ARGUMENT ON THE OSAGE TREATY PROCLAIMED JANUARY 21, 1867.

BRIEF, 149.

PART III.

GENERAL PROPOSITION.

The Osage treaty, proclaimed January 21, 1867, (14 Stat., 687,) *does not make, or by any means secure, a grant of land in aid of the construction of a railroad.*

DIVISION I.

The treaty does not, by force of its own words or purpose, make a grant of land in aid of the construction of a railroad.

SECTION 1. *The language inadequate to make a grant.*

The words are plain, and the treaty should be held to mean what it says, that the lands are to be sold. (Fisher *vs.* Blight, 2 Cranch, 399; Sedgwick Stat., 194; Rex *vs.* Poor Law Commr., 6 Ad. & El., 7; Rex *vs.* Barrell, 12 Ad. & El., 468; Everett *vs.* Wells, 2 Scott, N. C., 531.)

On the words of the treaty, then, let us inquire: What shall be done as to these lands? Are they granted in aid of the construction of a railroad?

The treaty answers:

"Said lands shall be surveyed and sold."

How much of them?

The treaty answers:

"*Said* lands"—that is, *all* of them.

No rule of law or reason permits the court to say "said lands" do not mean *all* of said land, for there are no qualifying words, or words to limit the amount, and no means to determine *what part*, if not all.

How shall *all* said lands be surveyed and sold?

The treaty gives three directions as to the survey and sale:

1. "Under the direction of the Secretary of the Interior."

2. "On the most advantageous terms, for cash."

3. "As public lands are surveyed and sold under 'existing laws,' including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands."

Here are the three directions.

To what do they all relate?

Every one to *the survey and sale.*

When a *sale* only is directed, as the *sole* disposition of the lands, it would be a clear *interpolation* or *addition* to say a different disposition should be made by grant of any part in aid of a railroad.

There is not one word here in relation to a railroad grant.

The claim of the railroad company is that the "Senate amendment" shall be read *as it does not:*

"That said lands shall be surveyed, sold, [and granted in aid of the construction of a railroad through said lands,] under existing laws, including any act granting lands to Kansas."

But if it so read, it would encounter difficulties.

a. Even then, how is it to inure to the benefit of *these* companies? Which of the companies shall take? If it is construed to mean that the *sale* shall be in the mode prescribed by the acts granting lands to Kansas in aid of a railroad through the lands, then you can take "*any* act." But there are land-grants *to more than two companies*, and no mode of deciding which shall take or how an apportionment shall be made.

b. And if this word "*granted*" could be interpolated, still it is subject to the limitation that the lands "shall be sold or granted for *cash*"—not given without cash.

c. The court cannot interpolate the word "*granted.*" Rex *vs.* Poor Law Commissioners, 6 Ad. & El., 7; Rex *vs.* Barrell, 12 Ad. & El., 468; Everett *vs.* Wells, 2 Scott, N. C., 531.

BRIEF, 155.

SECTION 2. The inquiry may be made, what *is* the purpose of the words declaring that these lands shall be "surveyed and sold under existing laws, including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands?"

a. It is not the business of the United States in this case to explain or furnish any meaning. The very fact that there is difficulty in finding any is conclusive against the pretended railroad grant.

Green *vs.* Wood, (7 Q. B., 178–185.)

b. But if there be any meaning in the phrase, "existing laws, including any act granting land," &c., one thing is certain, they are only the laws, or provisions of such laws, *as relate to the survey and sale of lands.*

The language employed makes this clear.

In the instructions of the Secretary of the Interior to the Commissioner of the General Land-Office of July 20, 1869, in relation to the Osage lands, Secretary Cox says:

"I have serious doubts whether those words can, by any just rule of interpretation, be construed to apply to any other provisions of such an act than *those which relate to the survey and sale of lands.*"

And the rule of construction, "*noscitur a sociis,*" equally requires that they be interpreted as relating only to a sale of lands.

BRIEF, 156.

c. If it be absolutely necessary to give some effect to the Senate amendment, as it is not, it *can be done* by requiring the Osage ceded lands to be, in the language of the treaty,

"Sold under the direction of the Secretary, on the most advantageous terms, for cash, as public lands are *surveyed and sold* under existing laws, including any act granting lands to the State of Kansas in aid of the construction of a railroad."

Now, the two things to be done are to—(1) *survey*, and (2) *sell* the lands.

There are "existing laws" regulating the survey, and as to that there would be no difficulty. (1 Lester, 703–'17–'27; 2 Lester, 47.)

There are "existing laws" regulating the *sale* of lands, (1 Lester, 34, 342; Zabriskie, 417; 4 Opinions of Attorneys-General, 167,) and they were at one time deemed so far applicable to *these lands* that the President issued a proclamation for their public sale, which was afterward revoked.

And there are "existing laws" regulating the sale, *including the Kansas land-grant acts.* All the railroad land-grant acts contain provisions for sale of lands. (2 Lester, 75, 118, 178, 184, 194.)

d. Or it may have been a provision in favor of allowing a sale by pre-emption claims, as regulated by the land-grant acts. The treaty does not exclude *all modes* of securing pre-emption claims and homestead settlements. It only declares that the *treaty itself* shall not "recognize" any *then existing* pre-emption or homestead settlement other than those provided for in Article IV.

e. It is possible, too, that the Senate amendment may have been designed as a simple declaration that IF, under "any act granting lands to the State of Kansas," &c., any rights are claimed, they shall be left to stand on such merits as they may be supposed or claimed to have, if any.

BRIEF, 159.

SECTION 3. *The "Senate amendment" cannot be construed to make or recognize a railroad-grant, because this would defeat every purpose manifest in the treaty.*

The treaty shows that it was the purpose of the Indians to raise money by a sale of their lands.

It sets out by giving *four* reasons for a sale, all showing a necessity and purpose to raise money. By Articles III, IV, and IX, benefactors of the Indians are permitted to take lands *by paying for them.*

The treaty designed to raise $300,000, to re-imburse the United States; $20,000 for expenses of survey, and money besides to go to the civilization-fund.

But if there are two railroad-grants they overlap, and the granted limits of one become the indemnity limits of the other. Then the railroad companies would take all the lands outside of the ten-mile limits, and nearly all within as lands granted "in place" or "indemnity."

Under the joint resolution of April 10, 1869, there were only 2,295 entries perfected, "aggregating $235,436\frac{58}{100}$, which, at $1.25 per acre, would amount to $292,545.72."

The amount realized under Article IV was $27,894.67, and an insignificant sum under other articles.

But a large part of all the entries from which the $292,545.72 were raised, are held for cancellation by the Interior Department, and they only await the decision here, and, if canceled, the money must be refunded.

If the railroad claim is sustained, then the treaty will be defeated in its purpose to raise $300,000, and in its purpose to add to the civilization-fund.

This cannot be allowed, because it is a construction against the Indians, (Worcester *vs.* The State of Georgia,

6 Peters, 515,) and is a construction against the purposes of the treaty.

It will not do to say that the alternate reserved sections may be sold at the double minimum price, and will realize as much as all at the minimum.

a. It *assumes* what does not necessarily follow, that one-half could be sold at $2.50 per acre. This assumption also overlooks the important fact that the two railroad companies would swallow up every acre, both odd and even sections, for indemnity lands outside of the ten-mile limits, and nothing could be realized from any half there, and most if not all of the lands within the ten-mile limits would be taken by the railroad-companies as lands granted "in place" or as indemnity.

b. If the whole were sold under proclamation, at *public sale*, under an "existing law," the half would not sell for as much as the whole. (Zabriskie's Land Laws, 417; Opinion of Attorney-General, March 29, 1843, volume 4, p. 167.)

c. And if the railroad companies took half the lands by virtue of the treaty, the residue, so far as sold at private entry under existing laws, would be at the *minimum*, and not the double-minimum price. The act of March 3, 1863, only adopts the double-minimum price for alternate sections where a grant has been made "by act of Congress," (10 Stat., 234,) not where it is made *by treaty.*

d. The question is not whether the lands would realize as much if the railroad-grant is allowed, but *what did the treaty agree to do.* It *did agree* that all the lands should be sold.

SECTION 4. *The condition of the "trust-lands" shows no railroad-grant attached in the "ceded lands."*

Secretary Browning decided that no railroad-grant

attached to the *trust-lands*, because "the United States took no beneficial interest in them." The treaty "constituted them a trustee, with a naked power to sell." There can be no difference in fact or legal effect as to the *status* of the trust and ceded lands, or the position of the United States, and if the railroad companies can take nothing in the trust-lands they can take nothing in the ceded lands.

It is perfectly certain that if any grant attached *by force of the act of* 1863 in the Osage lands, it attached as well to what are called the trust-lands as the ceded lands; the United States assumed the same duty as to both—to sell for the benefit of the Indians.

"No particular form of words is requisite to create a trust." (10 Johns., N. Y., 496; 4 Kent, 305.) And the same may be said of the diminished reserve. (See treaty, art. 16, and act of July 15, 1870, 17 Stat., 362.)

BRIEF, 167.

SECTION 5. *The omission of any provision in the treaty to determine how the lands should be divided between the railroad companies, is evidence that it made no land-grant in their favor.*

When the Osage treaty was made, and when the "Senate amendment" was accepted, September 21, 1866, both the railroad companies were claiming, under the act of 1863, a land-grant *north of the Osage ceded lands.*

Hence a contest arose between these companies as early as February, 1870, each claiming priority in the Osage lands. There never was any judicial or departmental decision of that question. But it is known, as a matter of history, it was compromised by an agreement between the companies to make an equal division.

SECTION 6. *The provision as to right of way shows there was no railroad land-grant.*

Article XI is divided into two parts. The first gives a right of way for ordinary roads through the lands "therein reserved," being those reserved for the Catholic mission, for settlers, and favored individuals, by articles 3 to 9, both inclusive.

The act of 1863 *had not given a right* of way for the railroad through *any of these lands.* It had given it, "*subject to the approval of the President.*" But it was necessary the Indians should consent. The second part of this article, XI, gives the right of way for all railroads.

And upon the authority of 5 Opinions, 578, the right of way was not given by the acts of August 4, 1852, (10 Stat., 28,) of March 3, 1855, (10 Stat., 683,) nor of July 15, 1862, (12 Stat., 577,) for these only gave it through the "*public lands.*"

If the treaty had designed to give *anything more* it would have done so in equally clear terms.

BRIEF, 170.

DIVISION II.

The treaty does not attempt to give construction to the act of Congress of March 3, 1863, (12 Stat., 772,) so as thereby to make a railroad land-grant. It cannot do so.

Here are two distinct principles:

1. *The treaty does not attempt to construe the act of* 1863.

SECTION 1. *The language of the treaty shows this.*

The "Senate amendment" alone is relied on.

It is perfectly clear that this language cannot *give* any *new right* to any railroad company.

It limits in express terms whatever disposition is made to "existing laws." It does not profess to construe them or say what they mean.

Where are the words which profess to explain any existing law? They are not to be found.

What is the construction? It is not found.

SECTION 2. *It is impossible to believe that the Senate would attempt any such construction.*

No treaty has ever yet attempted to make a *construction* of a statute. It would be a usurpation of judicial power. This is shown fully by authorities hereafter cited.

2. *A treaty cannot construe an act of Congress.*

SECTION 1. Congress can amend or alter its own laws so as to make the amended law a rule for the future. But it cannot, by any declaratory act, "recognition," or expression of opinion, direct the courts how "existing laws" shall be construed as to past transactions or rights. This would be a usurpation of the *judicial power.*

SECTION 2. But the treaty power, unlike congressional power, cannot amend or give construction to an act of Congress on a subject of purely internal administration, so as to give such act a new and different effect.

The Departments of Government are independent. If the treaty power can interfere with the power given to Congress to make "all needful rules and regulations respecting the territory and other property of the Uni-

ted States" for purposes of purely internal administration, then there is no legislative power it cannot annihilate.

BRIEF, 173.

DIVISION III.

The treaty does not "recognize" the existence of a prior land-grant by the act of March 3, 1863, (12 Stat., 772,) *and if it did, it could not thereby make it operative.*

This statement or proposition includes two distinct principles, which will be separately considered:

1. NO TREATY "RECOGNITION" OF A RAILROAD GRANT.

There is no word in the treaty which looks to a "recognition" of a previous railroad grant by act of Congress.

SECTION 1. The provision for a survey and sale of *all* the lands is a *denial* of such grant.

SECTION 2. *By article eleven of the treaty the lands are declared to be still* "THE LANDS OF SAID INDIANS."

And because they were so, the *right of way* is given over them for roads and railroads.

SECTION 3. *The treaty makes provision for the sale of lands utterly inconsistent with the idea of recognizing a railroad land-grant.*

There were 144 settlers who took 22,315$\frac{74}{100}$ acres, *odd and even sections*, under article 4 of the treaty. There is in it no reservation of *odd*-numbered sections theretofore granted by the act of March 3, 1863.

If there had been such prior grant, subject merely to the Indian right of occupancy, the treaty would necessarily have saved the rights thereby granted. But it proceeds to deal with the lands, utterly ignoring the idea of a previous railroad grant.

The other sections granted for the Catholic missions, and for other purposes, stand in the same condition, and prove the same purpose.

SECTION 4. *In fact, up to that time, nobody had publicly claimed a railroad grant, and hence the treaty entirely ignored it as a matter never heard of.*

SECTION 5. Nothing can better illustrate the utter failure to make out any real grant in aid of railroads than the uncertainty where to find it. The "Senate amendment" is relied on to sustain the act of 1863, and the act of 1863 to sustain the Senate amendment. These only *double the doubt*, but do not make a case where two negatives are equivalent to an affirmative. *Ex nihilo nihil fit.*

It has been claimed *exclusively*, by force of the "Senate amendment;" *exclusively*, by force of the act of 1863; by the combined operation of both; by the mere *date* of the *location of the road*, as if *that* could determine what Congress intended; and, finally, on the ground of a treaty "*recognition*" of a grant.

SECTION 6. *If the "particular Senator" who drew the "Senate amendment" did intend to recognize a railroad grant, it does not follow that his purpose is to be carried into effect.*

The treaty is to be construed as the Indians understood it. (Eldridge *vs.* Williams, 3 Howard, 1; 6 Opin-

ions, 464; 9 Opinions, 59; Akerman, Opinion, Dec. 18, 1870.)

2. IF THE TREATY "RECOGNIZED" A PREVIOUS RAILROAD LAND-GRANT, IT WOULD NOT THEREBY BECOME OPERATIVE AS SUCH.

It is one thing to make a grant, and a very different one to "recognize" it as having been made.

Unless the act of March 4, 1863, *in fact made a grant* in these lands, no mere "recognition" of such grant could make the act so operate. (Pennsylvania Railroad Company *vs.* Canal Commissioners, 9 Harris, 21 Pa. St. R., 9–71.)

BRIEF, 178.

DIVISION IV.

If this treaty was designed to make a railroad grant, or to give construction to the act of 1863, *it could at best only be a* CONTRACT, *but would not be operative* PER SE.

Its language is that of *contract*, Article 1st.

Foster & Elam *vs.* Neilson, 2 Peters, 253; Turner *vs.* American Baptist Missionary Union, 5 McLean, 345; Taylor *vs.* Morton, 2 Curtis, C. C. R., 454; case of Metzger, 1 Barbour, 248.

BRIEF, 183.

DIVISION V.

The treaty-power under the Constitution cannot, for infra-territorial purposes, grant land or otherwise construct internal improvements.

Const., art. 1, sec. 1, art. 4, sec 3; Debates in Constitutional Convention, August 15, 23, 1787; Federalist, No. 63; 6 Hamilton's Hist. Repub.; Lawrence's Wheaton,

457; Va. Convention, June 17, 1788; 1 Tucker's Blackstone, appx. 339; Annals Cong., January, 1816, p. 49; 1 Benton's Abridgment, 671-702; Benton's Thirty Years' View as to Cherokee treaty, p.—; 4 Hamilton's Works, 340; 7 Hamilton's Hist. Repub., 518-556.

The note to Metzer's case, (1 Barb., 258.)

If a different claim has been made, it has been in cases affecting foreign nations and on the ground that the subject was *international*, and, by the usage of nations, within executive or treaty power.—(1 Woodbury & Minot's R., 66; Ex. Doc. 25, third session 41st Congress; Attorney-General Akerman's Op., December 15, 1870; Debates in Congress, 1794, as to Nash *alias* Robbins.)

The treaty cannot confer power on the Secretary of the Interior.

If the treaty could in all other respects be regarded as operative law, it still is inoperative, because it can enjoin no duty on the Secretary of the Interior.

He is an officer whose office is created, and whose duties are prescribed, by act of Congress.

Under the Constitution officers can only be created "By the President, by and with the advice and consent of the Senate."

If the Secretary performs duties under the treaty he assumes to be *quoad hoc* an officer created by treaty, and this cannot be. It would be destructive of the laws by which, and the duties for which, he was appointed.

Such office could, in fact, only "be established by law" of Congress.—(United States *vs.* Maurice, 2 Brock, 96; 19 Howard, 611.)

The act of March 3, 1863, (12 Stat., 793, secs. 4, 5,) authorized treaties, but not treaties having the *effect of*

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The act of March 3, 1863, (12 Stat., 793, secs. 4, 5,) authorized treaties, but not treaties having the *effect of*

municipal laws. It was not a power to do what Congress only could do.

It was also a power to be exercised in obedience and subordination to the act of July 22, 1854, (10 Stat., 310, sec. 12,) and not a power to repeal. The Osage treaty was therefore made by virtue of the treaty-power, and not under the statute.—(Holden *vs.* Joy, 17 Wallace, 211.)

BRIEF, 188.

ARGUMENT ON THE JOINT RESOLUTION OF APRIL 10, 1869.

PART IV.

I. *The joint resolution of April* 10, 1869, (16 Stat., 55,) *affirms that there has been no railroad grant, and, as a legislative construction of the act of March* 3, 1863, *is entitled to great weight. It carries out the long-settled policy of regarding Indian reservations* NOT *as "public lands," but as Indian lands, subject to have the Indian title extinguished by treaty, and then sold for the benefit of the Indians.*

II. *If a railroad land grant is to be claimed only by operation of the Osage treaty proclaimed January* 21, 1867, *the joint resolution of April* 10, 1869, *is a construction against it, which it is the duty of the court to adopt as final and conclusive.*

SECTION 1. The joint resolution declares: "That *both* the *odd* and even-numbered sections of said lands shall be subject to settlement and sale."

Here is a clear, distinct, unequivocal denial of any railroad land-grant in any of these lands.

Congress even has power to repeal a treaty. (The Cherokee Tobacco, 11 Wallace, 621.)

The proviso was not designed to save any rights of a railroad company. The word "parties" does not include it. (Pennsylvania Railroad Company *vs.* Canal Commissioners, 9 Harris, Pa. St., 9–21.)

SECTION 2. The *proviso* excludes corporations upon the maxim "*noscitur a sociis.*"

Congress seems purposely to have avoided the use of the word "person," which, under some circumstances, might include a *corporation.* (Sedgwick, Stat., 2d ed., 372; 4 Cal., 304; 1 Bush., Ky., 250; 56 Barb., 46; 10 Wis., 351; 3 Brewst., 124.)

SECTION 3. *This proviso had a purpose without including a saving for any railroad company.*

It saved the rights of 144 settlers under article 4 of the treaty, &c.

It does not profess to *grant* or *ratify* anything.

The settlers were invited on these lands by the joint resolution, and by the action of the officers of the Government.

SECTION 4. *The joint resolution of April* 10, 1869, *is to be regarded as conclusive against the claim of a railroad land-grant, by virtue of the treaty.*—(Sedgwick on Construction of Statutes, 2d ed., 386; 2 Peters, 253–307.)

Sedgwick says:

"It is important to notice the rule that *in the construction of this class of documents the judiciary, in one respect, do not occupy the same position nor hold the same language that they do in regard to other matter of written law. Whenever the nation, by its properly-constituted agents, has declared its interpretation of a treaty, that interpreta-*

tion becomes binding on the courts.—(Webster *vs.* Reid, 11 Morris, Iowa R., 467.)

This court has expressly disclaimed any right to pass upon political questions.—(Georgia *vs.* Stanton, 6 Wallace, 50; Grossmeyer *vs.* U. S., 4 N. & H., 1; The Protector, 12 Wallace, 700; U. S. *vs.* Fifteen Hundred Bales, &c., 15 Int. Rev. Rec., 137; Van Antwerp *vs.* Hulburd, 7 Bl. C. C., 426; U. S. *vs.* Baker, 5 Bl. C. C., 6; Mississippi *vs.* Johnson, 4 Wallace, 475.)

And, again, Sedgwick says:

"It has been insisted that the Federal Government had no power to make a treaty that could operate to annul a legislative act of any of the States, or to destroy vested rights, but the contrary has been expressly decided."—(Sedgwick, Stat., 2d ed., 385; Ware *vs.* Hylton, 3 Dallas, 236; Denu, &c., *vs.* Harnden, 1 Paine, C. C., 54; U. S. *vs.* Schooner, 1 Cranch, 109.)

Here, then, in the joint resolution of April, 1869, Congress has construed the act of March 3, 1863, *in a form which could even divest a former railroad grant, if one had been* MADE, and has in part executed the treaty, and by the Indian appropriation act, (16 Stat., 39,) of the same date with the joint resolution, advanced $30,000 to the Indians in aid of the execution.

The joint resolution was a repeal of the treaty as to the lands, if it had a purpose even to direct a mode of sale. Congress could repeal it.—(Cherokee Tobacco, 11 Wallace, 616; Ropes *vs.* Clinch, 8 Bl. C. C., 304.) The act of August 4, 1854, (1 Lester, 238,) repealed the act of June 29, 1854, (1 Lester, 226,) granting land to Minnesota for railroads.

BRIEF, 209.—ARGUMENT ON THE "THAYER ACT."

PART V.

THE "THAYER ACT."

The act of Congress of April 19, 1871, *does not aid the claim of a land-grant.*

It is not a "recognition" of a grant. This was not *its purpose.* If it had been, it would not make or aid a grant. (Pa. Railroad Co. *vs.* Canal Comm'rs, 9 Harris, 21; Pa. St., 9–21; Bingham *vs.* Supervisors, 8 Minnesota, 448; Dash *vs.* Van Kleck, 7 Johnson, 598; P. M. Gen'l, *vs.* Earley, 12 Wheaton, 148; Pike *vs.* Megoun, 44 Missouri, 491; Sedgwick on Stat., 227.)

Its purpose was to authorize a *relocation of the road.* In doing this, as *mere matter of description,* Thayer was described as within the grant. This is a mistake. This false description may be rejected to carry out the purpose of the act in accordance with the maxim: "*Falsa demonstratio non nocet cum de corpore constat.*" (6 T. R., 676; Broom's Maxims, 269; Bacon Max. Reg., 25; 1 Greenleaf Ev., sec. 301.)

WM. LAWRENCE,
Of Counsel.

FEBRUARY, 1875.

34. 35. 40. 47. 65. 68. 68. 78. 82. 148. 202. 229 233 235

In the Supreme Court of the United States.

OCTOBER TERM, 1874.

THE LEAVENWORTH, LAWRENCE, AND GALVESTON RAILROAD COMPANY, *Appellant*,
vs.
THE UNITED STATES. } No. 676.

Appeal from the Circuit Court of the United States for the District of Kansas.

The material facts disclosed by the record are these:

[THE BILL.]

On the 25th February, 1874, the United States filed a bill in equity against the Leavenworth, Lawrence, and Galveston Railroad Company, in the circuit court of the United States for the district of Kansas, which, in substance, avers that since the proclamation of the treaty of November 10, 1808, (7 Stat., 107,) between the United States and the Osage nation of Indians, and until after January 21, 1867, said Indians were the owners and in exclusive possession of a tract of land, described by metes and bounds in the bill, fifty miles long, north and south, by thirty miles wide, including the counties of Neosho, Labette, and a part of Bourbon, Crawford, Allen, Wilson, and Montgomery, in Kansas, and containing 960,000 acres of land; that the ownership and possession were guaranteed by the treaty of June 2,

1825, (7 Stat., 240,) which "*reserved*" said lands to and for said Indians so long as they might choose to occupy the same; that on the 29th September, 1865, said Indians owning *other lands* and having more than were then necessary for their occupation, made another treaty with the United States which, by its terms, was not to go into effect until ratified and proclaimed, the latter of which was done 21st January, 1867, (14 Stat., 687;) that, in pursuance of the treaty, the United States advanced to the Indians $300,000, and by it the Indians ceded the lands described to the United States, *in trust*, to survey and sell *as the public lands* of the United States are surveyed and sold, on the most advantageous terms for cash, and out of the proceeds of sale, "after reimbursing the United States the cost of said survey and sale and said $300,000, the remaining proceeds of the sale shall be placed in the Treasury of the United States to the credit of the civilization fund, to be used under the direction of the Secretary of the Interior for the education and civilization of Indian tribes," and the United States took only the naked legal title clothed with the trust; that the $300,000 were, as the treaty required, placed in the Treasury of the United States, and Congress, from time to time, appropriated money to pay the annual interest thereon for the benefit of the Indians; that, in execution of the trust, Congress passed a joint resolution requiring a sale of the lands, on the 10th of April, 1869, (16 Stat., 55,) by virtue of which 314,220 acres were sold to actual and *bona fide* settlers thereon, for which they paid the United States $454,072 10; that the title of the remaining portion of the 960,000 acres remains in the United States subject to said trust; that defendant

pretends that, under acts of Congress approved March 3, 1863, (12 Stat., 772,) and July 26, 1866, (14 Stat., 289,) said land was granted to the State of Kansas to aid in the construction of certain railroads, and by virtue of an act of the legislature of Kansas approved February 9, 1864, and by reason of certain lists of land furnished by the Secretary of the Interior to the Governor of the State, and certain patents from the State, defendant claims to own a large part of said land, including the odd sections disposed of under joint resolution; that none of said land is included in either of said grants to Kansas, but is expressly excluded therefrom; that, when the act of March 3, 1863, was passed, defendant was a corporation by the name of the Leavenworth, Lawrence, and Fort Gibson Railroad, but its name has since been changed to the Leavenworth, Lawrence, and Galveston Railroad Company; that said grant was made, among other things, to aid in the construction of a railroad and telegraph from Leavenworth *via* Lawrence to the south line of the State, in the general direction of Galveston Bay, Texas, with a branch up the valley of the Wakarusa river; that no such road has been built; but defendant built a railroad from Lawrence to the south line of the State, in the general direction of the Rio Grande river, with a branch from the town of Ottowa on said road to Kansas City, Missouri; that said grant required the roads therein mentioned to be completed in ten years from its date, which time has elapsed; that on the 19th March, 1863, the Secretary of the Interior, to enable the State of Kansas to comply with said grants, made an order withdrawing the lands from market along the line of said Leavenworth, Lawrence, and Fort Gibson

Railroad; that said withdrawal embraced the odd [numbered] sections for ten miles on each side of said road and branches, and extended from Leavenworth south to the north boundary of the then Osage lands, hereinbefore described; that neither the State nor defendant then made any claim to said Osage lands; that the line and route of defendant's road were definitely fixed before 21st January, 1867; that, on the 26th July, 1866, (14 Stat., 289,) Congress passed another act granting lands to Kansas to aid in the construction of the Union Pacific Railway, south branch, from Fort Riley to the south line of the State, and the name of this corporation has since been changed to the Missouri, Kansas, and Texas Railway, [Company;] that said last-named grant embraced the odd sections on each side of the line of said road for ten miles, with an "indemnity" grant beyond this of ten miles more along the granted limits; but the selections of indemnity land in the said grant were not limited to odd sections; that both of said companies have built lines of road to the south line of the State, which cross each other at or near the north boundary of the lands hereinbefore described, and run nearly parallel with each other through said last-named lands; that no part of the lands so granted was applied to the construction of said road as required by section 4 of the act 3d March, 1863, or in any manner; that the Governor never certified that any "section of twenty consecutive miles of said road was completed in a good, workmanlike, and substantial manner as a first-class railroad;" that the Governor never sold any of said land embraced in the grant by the act of 3d March, 1863, and none of the proceeds of the sale of any were applied to aid in the

construction of defendant's road; that the Governor never certified that the whole of said road and its branch had been completed; but the only certificate made by the Governor to the Secretary of the Interior is as follows:

"STATE OF KANSAS:

"EXECUTIVE OFFICE, *Topeka, September*, 1871.

"I, James M. Harvey, Governor of the State of Kansas, do hereby certify that the map or plat of the railroad of the Leavenworth, Lawrence, and Galveston Railroad Co. has been duly filed in my office, by the said Leavenworth, Lawrence, and Galveston Railroad Co., and shows that portion of said railroad commencing at Lawrence, Kansas, and ending at the south line of the State of Kansas, in the direction of Galveston Bay, in Texas, which has been completed and equipped as required by the act of Congress approved March 3, 1863, and the act of Legislative Assembly of the State of Kansas, approved February 9, 1864, entitled 'An act to accept a grant of lands made to the State of Kansas, by the Congress of the United States, to aid in construction of certain railroads and telegraphs in said State, and to apply the same to the construction of said railroads and telegraphs,' granting land to the said railroad company.

"In testimony whereof, I have hereunto set my hand and caused to be affixed the great seal of the State of Kansas.

"Done at the State capitol, this 21st day of September, 1871.

[SEAL.] "JAMES M. HARVEY, *Governor.*"

—that said Railroad companies were organized under the laws of Kansas; that, on receipt of said certificate by the Secretary of the Interior, he certified back to the Governor a list of ALL the odd [numbered] sections of lands shown by said map within ten miles of the line

of said railroad, and upon the receipt of said certificate the Governor issued patents for said lands to the defendant, copies of which are made exhibits; that said patents constitute a cloud on the legal title of the United States, and are calculated to prevent and embarrass the execution of said trust, and the Secretary of the Interior has decided that all the lands purchased by said settlers under the joint resolution belong to the defendant, which comprise more than half of the said lands so sold, and has cancelled the entries of the purchasers and refuses to issue patents to them; that said certificate from the Secretary of the Interior [to the Governor with list of lands] and said patents are unauthorized and void.

The bill prays the court to decree that the legal title to the lands described in the treaty of 21st January, 1867, is in the United States, in trust for the purposes stated; that said certificate [and lists] and said patents be declared void, and that defendants be enjoined from asserting any claim to said lands.

The patents are dated 8th April, 1872, and 21st March, 1873, and are for odd-numbered sections.

[The Answer of Railroad Company.]

On 19th March, 1874, said Railroad Company filed answer, which admits the occupancy of the Indians until after the treaty of 29th September, 1865, to which defendant refers to show the right acquired by the United States in said lands, as well as other rights acquired, recognized, or affirmed by or to the State of Kansas.

The answer avers that the act of 3d March, 1863, (12 Stat., 772,) granted to the State of Kansas, for the pur-

pose of aiding in the construction of a railroad and telegraph from Leavenworth *via* Lawrence and the Ohio City crossing of the Osage river, to the southern line of Kansas, and in the direction of Galveston Bay, in Texas, every alternate section of the lands so conveyed by by said treaty, designated by odd numbers, for ten sections in width on each side of said road. That by said act said grant was not to become operative or pass title to any lands until the line of the railroad was, by survey and location, definitely fixed and located; that said defendant, since said act, has been a corporation authorized to build and operate said road and telegraph; that its original name was "Leavenworth, Lawrence, and Fort Gibson Railroad and Telegraph Company," afterwards changed to "The Leavenworth, Lawrence, and Galveston Railroad Company," by which it holds all the property, rights, and franchises of both companies, and that said lands described in the schedule to the bill are the odd sections of land within ten miles on either side of defendant's road, as afterwards located and built, and are on the route and along the line of railroad intended to be built by said act of Congress; that the State of Kansas, by its legislature, by act of February 9, 1864, did accept said grant, and duly assigned, sold, and granted to said company under its former name, in consideration of its constructing a railroad and telegraph from Leavenworth, by way of Lawrence *via* the Ohio City crossing of the Osage river, to the south line of Kansas, in the direction of Galveston Bay, applicable to the construction of the railroad and telegraph along the line just indicated, and by said act agreed to convey the title by patent to said company as fast as it should complete any consecutive

twenty miles of railroad and telegraph along said line, the lands lying within the limits of said grant; that within the time prescribed, and in conformity with said act of the legislature of Kansas, said company accepted the provisions of the act, and filed a certified copy of such acceptance with the Secretary of State of Kansas, and afterwards, before 3d March, 1872, constructed its railroad and telegraph in all respects in conformity with said act of Congress and said act of the legislature of Kansas, on the route indicated by said acts, from Lawrence to the south line of Kansas, a distance of about 150 miles; that said railroad was projected through a wild and mostly unsettled country, although most of the lands lying north of the tract of land described in the bill as being ceded by the Osage Indians to the United States had been sold or otherwise disposed of, so that the same could not be applied to the purpose of assisting or building a railroad; that Congress deemed the settlement of said tract of country of great public benefit, and made said grant, and, to secure the application thereof, provided that said grant should not be operative until the actual survey and location thereof; that the road could not be built except by governmental aid, and the United States provided satisfactorily for reimbursement for such aid by doubling the price of the even-numbered sections within the limits of the grant; that said company did in November, 1867, and not before that time, make an actual survey upon the ground and location of their said road and definitely fixed the line and route thereof, and on the 7th December, 1867, duly filed with the Governor of the State a map of such location and survey, and on the 2d January, 1868, filed with the Commis-

sioner General Land Office of the United States a map of such location and survey; that on 21st January, 1868, the Secretary of the Interior withdrew said lands mentioned in the bill from market, public entry, and sale; that immediately after said location the company proceeded to build said road and telegraph, and completed the same before 1st October, 1871, as required by act of Congress, and had the same fully equipped and in operation; that thereupon the Governor of Kansas, having personally inspected said road and telegraph, certified to the Secretary of the Interior the completion of the same through the whole of said lands in accordance with the provisions of said act of Congress, which was satisfactory evidence to said Secretary that the company had completed, in a good, substantial, and workmanlike manner, as a first-class railroad, the said road through the whole of said lands specified in the bill, being about 50 miles through said lands, and that the State had complied in good faith with said act of Congress, and thereupon the Secretary of the Interior duly certified to the Governor of Kansas the lands said State was entitled to by virtue of said act of Congress; that, upon the certification of said lands to him, the Governor granted and issued patents to the company for said odd-numbered sections of land, which were duly recorded; that the State levied annual taxes on all said lands for State, county, municipal, and educational purposes, which for 1872 alone amounted to $50,000 paid by the company; that after the company had built said road within said tract of land to the town of Thayer, which is about half of the distance through the same, Congress, by act of April 19, 1871,

acknowledged the validity of the grant to the company and authorized it to relocate its said road south of Thayer and within the limits of the grant, and that the United States and Kansas, by these public acts and by taxing said lands, have recognized the title of the company to said lands; that after the treaty of 29th September, 1865, was made, and before the proclamation thereof, the United States caused the treaty to be amended, and in the amendment definitely recognized and affirmed the grant to Kansas and the title thereto of the company, and said treaty expressly provided that said lands should be appropriated for the building of said road, and, after this, said treaty was proclaimed, 21st January, 1867, and became law.

The answer admits that the act of Congress of July 26, 1866, (14 Stat., 289,) granted lands to Kansas to aid in the construction of the Union Pacific Railway southern branch, as alleged in the bill, and that both companies have built roads to the south line of Kansas, and the roads cross each other near the northern boundary of the lands in controversy, and thence run nearly parallel to the south line of the State. The answer denies that no part of said lands were applied to the construction of defendant's road by the State in the manner provided in said act, but alleges that the same were applied as hereinbefore stated.

The answer alleges that the company, being largely indebted for the cost of building said road and telegraph, to raise money to pay its indebtedness, mortgaged to the Farmers' Loan and Trust Company of New York City the whole of said lands to secure the bonds of the company thereupon issued, for about $5,000,000,

and the bonds were by said Trust Company negotiated in good faith and for valuable considerations in money to divers parties.

[THE ANSWER OF LOAN AND TRUST COMPANY.]

June 3, 1874, the Farmers' Loan and Trust Company, by consent, filed answer averring its corporate capacity to take the mortgage mentioned in the answer of the railroad company, which it adopts, and annexes a copy of the mortgage which covers lands granted to the railroad company, and avers "that the great body of lands mentioned in said mortgage are those mentioned in the bill," that the mortgage was recorded in Neosho and Labette counties in July and August, 1869, and that the security for the bonds issued is dependent to a very great extent on the validity of the title claimed to the lands in the bill.

The mortgage covers "all the right, title, and interest" of the railroad company in lands granted by the act of Congress of March 3, 1863, and all conveyed by the act of the Legislature of Kansas of 23d February, 1866, and "all the present and in future to be acquired property of the railroad company, the railroad made and in operation and yet to be constructed, its revenues, and all its rights and privileges."

[REPLICATIONS.]

Replications were duly filed to these answers in the usual form, averring the answers to be untrue, &c.

[DEPOSITION.]

The deposition of John W. Scott, filed June 8, 1874, states—

That he is land commissioner of the Leavenworth, Lawrence, and Galveston Railroad Company, and has been so since June, 1871; that he knows all the lands said company has obtained from the United States under the act of Congress, approved March 3, 1863; that it has received in the county of Douglas, no lands; in the county of Franklin, two thousand seven hundred and eighty-three and thirty-five hundredths (2,783.35) acres; in the county of Anderson, thirty thousand seven hundred and seventy-six and sixty-seven hundredths (30,776.67) acres; and in the county of Allen, forty-two thousand five hundred and thirty-two and fifty-six hundredths (42,532.56) acres—making a total of seventy-six thousand and ninety-two and fifty-eight hundredths (76,092.58) acres; that, in addition to the above-mentioned lands, the said Railroad company has received on an exchange with the Missouri, Kansas, and Texas Railway Company, north of the Osage ceded tract, twenty-six thousand one hundred and seventy-six and fifteen hundredths (26,176.15) acres; and that these are all the lands received, as aforesaid, by the said company, north of the Osage ceded lands; that it received one hundred and twenty-three thousand two hundred and eighteen and fourteen hundredths (123,218.14) acres from the State of Kansas of what is known as internal-improvement lands.

The following agreed statement is also in the record:

[AGREED STATEMENT OF FACTS.]

The United States vs. *The L., L., & G. Railroad.*
Same plaintiff vs. *M., K., & T. Railroad Co.*

I. It is mutually agreed that the following evidence may be introduced in each of the above cases:

1. The annexed maps, marked 1, 2, 3, 4, 5; also, three series of letters, marked A, B, C, D, E, F.

2. That the register of the land office at Humboldt, in the State of Kansas, received the letter of the Commissioner of the Land Office, of the date of 21st of January, A. D. 1868, on the 4th day of February, 1868; said letter is found in series marked A.

3. That certified lists of the lands patented to the Leavenworth, Lawrence, and Galveston Railroad by the State of Kansas were issued by the Interior Department and received by the Governor of the State of Kansas, before the said patents were issued to said road for the said lands in the bill described.

4. That, under the joint resolution of 10th of April, 1869, lands had been entered at the local land office, and that said entries had been cancelled and set aside by the Secretary of the Interior, at the instance of said railroad companies, claiming said land as part of their grants, but that no patents have issued, as yet, to either of said railroad companies for any of said land entered under said joint resolution.

5. That the town of Thayer is situated on sections Nos. 29 and 30, township 29, range 18, in Neosho county, Kansas.

6. Said railroad companies have paid taxes on said lands in their answers mentioned, for State, county, and municipal purposes, from the time of the completion of their said road up to the year 1873.

* * * * * *

9. It is admitted that the Missouri, Kansas, and Texas Railroad has succeeded to all the rights of the Atchison, Topeka, and Santa Fé Railroad, for building a road from, at, or near Fort Riley, down the Neosho valley, to where the Leavenworth, Lawrence, and Galveston Railroad enters the Neosho valley, and that the said Missouri, Kansas, and Texas Railroad has built said road from Fort Riley to said point where the Leavenworth, Lawrence, and Galveston Railroad enters said valley.

This is all the evidence.

[PROCEEDINGS IN COURT.]

At the June term, 1874, of the circuit court, on 25th August, a decree was rendered that the patents for the lands and all evidence of title in the railroad company be cancelled, and the company perpetually enjoined from asserting any title.

The company appealed, and so the case is now in this court.

MATERIAL FACTS.

There are physical facts material to a correct understanding of this subject.

There was not at the date of the act of 1863 or 1866, or at any time, any lands before that "*reserved* for any purpose" to which these acts could refer but the *Osage reservation.*

The act of 1863 requires a railroad to start "from the *City* of Leavenworth." The *military* reservation at Fort Leavenworth is situated three miles north of the north boundary of the city.

The act makes a grant for a road only "to the southern line of the State." On this line there was no military reservation. The military reservation at Fort Gibson is in the Indian Territory, "a hundred and fifty miles from the southern line of Kansas."

The Osage Indian reservation was on the line of the Leavenworth, Lawrence, and Galveston Railroad in 1863, and up to the proclamation of the Osage treaty, 21st January, 1867.

The Ottawa Indian reserve was on the line of this road in 1863, and in November, 1867, when the line of the road was surveyed, located, and "definitely fixed." It had been set apart as an Indian reserve by 3d article

of treaty of August 30, 1831, (7 Stat., 360,) and was authorized to be sold by 9th article of treaty of June 24, 1862, (12 Stat., 1240,) but had only been in part sold in 1867.

THE CLAIM OF THE UNITED STATES.

The United States assert a legal title to the lands in controversy, and ask a decree to quiet that title. This title is readily traced.

The lands included in the State of Kansas were ceded "to the United States forever and in full severalty," as a part of the Louisiana purchase, by the treaty with the French Republic of April 30, 1803.—(8 Stat., 200.)

At the time of the acquisition, the United States found a large portion of the Louisiana purchase occupied by the Great and Little Osage Indians, in what is now a portion of Kansas.

By the treaty of June 2, 1825, a portion of the lands were ceded to the United States, in these words:

"The Great and Little Osage tribes or nations do hereby cede and relinquish to the United States their right, title, interest, and claim to * * * lands lying west of the State of Missouri," &c.

But another portion, including the lands now in controversy, were *reserved* to the Indians, in these words:

"Within the limits of the country above ceded and relinquished there shall be *reserved* to and for the Great and Little Osage tribes or nations aforesaid, *so long as they may choose to occupy the same*, the following-described tract of land," &c.—(7 Stat., 240.)

The lands thus became an *Indian reservation*, and were occupied as such, until parts were surrendered to the Government in March, 1867, under the treaty of

September 29, 1865, and the residue in 1871, under the act of July 15, 1870.—(17 Stat., 363.)

This treaty was concluded between the United States and the Great and Little Osage Indians September 29, 1865, proclaimed January 21, 1867, (14 Stat., 687,) since which the Osage lands in Kansas have been classified or designated in three parcels, as "Osage *ceded* lands," "Osage *trust* lands," and the "Osage *diminished* reservation." The *ceded* lands were so called because *ceded* by the treaty to the United States, "to be surveyed and sold for cash," in accordance with a similar policy pursued in many other treaties; the *trust* lands were so called because ceded *in trust* for certain purposes by the treaty, and the residue was called the "*diminished* reservation" because the "Osage reservation," as defined by the treaty of 1825, had been *diminished* by the cession of the so-called "ceded" and "trust" lands.

By article XII ot the treaty of 1865 it is provided that—

> "Within six months after the ratification of this treaty, the Osage Indians shall remove from the lands sold and ceded in trust and settle upon their diminished reservation."

The treaty was finally ratified by the Indians, September 21, 1866, so that they occupied *all* the lands to March 21, 1867, when they vacated the ceded and trust lands, and continued to occupy the diminished reservation.

That portion of Kansas known as the "Osage ceded lands" is about fifty miles long and thirty miles wide, including all of the counties of Neosho and Labette, and small portions of Montgomery, Wilson, Allen, Bourbon, Crawford, and Cherokee.

The United States thus exhibit a clear title, unless by some means it has been divested.

THE CLAIM OF THE LEAVENWORTH, LAWRENCE, AND GALVESTON RAILROAD COMPANY.

The railroad company claims that the title to the odd-numbered sections within ten miles on each side of its line of road has become vested in it, except so far as the Missouri, Kansas, and Texas Railroad Company has acquired a portion of them.

To support this claim, the Leavenworth, Lawrence, and Galveston Railroad Company asserts a grant made by force of one or more of the means following, to wit:

I. The act of Congress of March 3, 1863, (12 Stat., 772;) the Kansas act of February 9, 1864, and the proceedings under them.

II. The Osage treaty, proclaimed January 21, 1867, (14 Stat., 687.)

III. The act of Congress of April 19, 1871, known as the "Thayer act," (17 Stat., 5;) and

IV. The joint resolution of April 10, 1869, (16 Stat., 55.)

THE QUESTIONS FOR DECISION.

The great and main questions for decision, therefore, are these—

Has the title of the United States been divested?

Has the Leavenworth, Lawrence, and Galveston Railroad Company acquired a legal or equitable title to any part of these lands beyond a mere right of way over them for a road?

As the railroad company claims under the United States, the *onus* of making good the claim is on the company.

It will be the purpose of this brief to show that no grant has been made by any of the means relied on.

To facilitate this inquiry, I present, in chronological order, the treaties, statutes, and material facts of the case, so far as deemed necessary, with portions of public records in the General Land Office explanatory of them:

DATES IN CHRONOLOGICAL ORDER OF TREATIES, STATUTES, AND MATERIAL FACTS.

I. 1803—April 30, treaty of Paris; (8 Stat., 200.)

The lands included in the State of Kansas were ceded "to the United States, forever and in full sovereignty," by the treaty with the French republic of April 30, 1803.

II. 1808—Nov. 10, Osage treaty; (7 Stat., 107.)

III. 1825—June 2, Osage treaty; (7 Stat., 240.)

This is in part as follows:

"ARTICLE I. The Great and Little Osage Tribes or Nations do hereby cede and relinquish to the United States all their right, title, interest and claim to lands lying within the State of Missouri and Territory of Arkansas, and to all lands lying west of the said State of Missouri and Territory of Arkansas, north and west of Red river, south of the Kansas river, and east of a line to be drawn from the head sources of the Kansas, southwardly, through the Rock Saline, with such reservations, for such considerations and upon such terms, as are hereinafter specified, expressed and provided for.

"ARTICLE II. Within the limits of the country above ceded and relinquished, *there shall be reserved to and for the Great and Little Osage Tribe or Nation aforesaid, so long as they may choose to occupy the same, the following described tract of land:* Beginning at a point due east of White Hair's village, and twenty-five miles west of the western boundary line of the State of Missouri, fronting on a north and south line, so as to leave ten miles north and forty miles south of the point of the said beginning, and extending west with the width of fifty miles to the western boundary of the lands hereby ceded and relinquished by said tribe or nation, which said reservation shall be surveyed and marked at the expense of the United States; and upon which the agent for said tribe or nation, and all persons attached to said agency, as also such teachers and institutions as the President may think proper to authorize and permit, shall reside, and shall occupy and cultivate, without interruption or molestation, such lands as may be necessary for them. And the United States also hereby reserve to themselves forever the right of navigating freely all water courses and navigable streams within and running through the tract of country above reserved to said tribe or nation."

The above tract of country, facing on the east fifty miles and running back to the western boundary of the tract described in the first article of the above treaty, continued to be the Osage Indian reservation, and was used and occupied by them as such, until they relinquished their right thereto as hereinafter stated. The land in dispute is part and parcel of the reservation described in the second article of the treaty of 1825, and was used and occupied by the Osage Indians until the treaty of 1865 was proclaimed, which took place the 21st of January, 1867.

IV. 1858—February 12: Act of the Kansas territorial legislature, incorporating the Leavenworth, Law-

rence, and Fort Gibson Railroad Company—name since changed to Leavenworth, Lawrence, and Galveston Railroad Company.

V. 1863—March 3: Congress passed "An act for a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said State." (12 Stat., 772.)

The Leavenworth, Lawrence, and Galveston railroad claim under act of March 3, 1863, which is as follows:

"AN ACT for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State."—(12 Stat., 772.)

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That there be, and is hereby, granted to the State of Kansas, for the purpose of aiding in the construction: First, of a railroad and telegraph from the city of Leavenworth, by way of the town of Lawrence, and *via* the Ohio City crossing of the Osage river, to the southern line of the State in the direction of Galveston Bay, in Texas, with a branch from Lawrence by the valley of the Wakarusa river, to the point on the Atchison, Topeka, and Santa Fé railroad where said road intersects the Neosho river. Second, of a railroad from the city of Atchison, *via* Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Santa Fé, New Mexico, with a branch from where this last-named road crosses the Neosho, down said Neosho valley to the point where the said first-named road enters the said Neosho valley; *every alternate section of land, designated by odd numbers, for ten sections in width on each side of said road and each of its branches. But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose what-*

ever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purpose aforesaid, from the PUBLIC LANDS *of the United States nearest to tiers of sections* above specified, so much land, in alternate sections or parts of sections, *designated by odd numbers*, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of pre-emption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers and selected by the direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid: *Provided*, That the land to be so selected shall, in no case, be located further than twenty miles from the lines of said road and branches: *Provided further*, That the lands hereby granted for and on account of said road and branches severally, shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided: *Provided, also*, That no part of the land granted by this act shall be applied to aid in the construction of any railroad or part thereof, for the construction of which any previous grant of land or bonds may have been made by Congress: *And provided further, That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose* of aiding in any object of internal improvement, *or for any other purpose whatsoever, be*, and the same *are hereby reserved to the United States from the operation of this act*, except so far as it may be found necessary *to locate the routes of said road and branches through such reserved lands;* in which case the right of way only shall be granted, subject to the approval of the President of the United States.

"SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which, by such grant, shall remain to the United States, within ten miles on each side of said road and branches, shall not be sold for less than double the minimum price of the public

The following is the act of the Legislature of the State accepting said grant:

"AN ACT to accept a grant of lands made to the State of Kansas by the Congress of the United States, to aid in the construction of certain railroads and telegraphs in said State, and to apply the same to construction of such roads and telegraphs.

"*Be it enacted by the Legislature of the State of Kansas*:

"SEC. 1. The State of Kansas hereby accepts the grant of lands made to this State by the Congress of the United States, by act entitled 'An act for a grant of lands in the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State,' approved March 3, 1863, upon the terms and conditions set forth in said act of Congress.

"SEC. 2. In consideration that the Leavenworth, Lawrence, and Fort Gibson Railroad and Telegraph Company shall construct a railroad and telegraph from the city of Leavenworth, by way of the town of Lawrence and via the Ohio City crossing of the Osage river, to the southern line of the State, in the direction of Galveston Bay, in the State of Texas, with a branch from Lawrence by the valley of the Wakarusa river, to the point on the Atchison, Topeka, and Santa Fe railroad where said road intersects the Neosho river, the State of Kansas hereby agrees to grant, bargain, and sell to said Leavenworth, Lawrence, and Fort Gibson Railroad Company, all that portion of the lands granted to this State by the above-named act of Congress applicable to the construction of the above-described railroad and telegraph, and the above-described branches thereof, and which shall be selected or located in conformity with the provisions of the above-mentioned act of Congress. And the said State of Kansas further agrees, and it is hereby enacted, that so soon as said Leavenworth, Lawrence, and Fort Gibson Railroad Company shall complete any twenty consecutive miles of either said road or branches, as required by said act of Congress, the Governor of this State shall, by

patent, convey to such company all the lands granted as aforesaid, which shall be situated opposite to and within a limit of ten miles of the line of said section of road thus completed, extending along the whole length of said completed section, and no further, and so, from time to time, until said road and branch shall be completed. And whenever said road, branch, and telegraphs shall be completed as required by said act of Congress, the Governor shall convey to said company all the remaining lands granted by said act of Congress and applicable to the construction of said road, branch, and telegraphs: *Provided, however*, That said agreement for the sale of said lands and all conveyances thereof, shall be for the uses and purposes, and subject to the conditions, reversions, and provisions set forth and contained in said act of Congress and in this act: *And provided further*, That at the point of intersection of said road and branch there shall be an equal division of the lands granted to aid in building said road and branch.

"SEC. 3. In consideration that the Atchison, Topeka, and Santa Fé Railroad Company (formerly the Atchison and Topeka Railroad Company) shall construct a railroad from the city of Atchison via Topeka, to the western line of said State, in the direction of Fort Union and Santa Fé, New Mexico, with a branch from where said road crosses the Neosho, down said Neosho valley to the point where the Leavenworth, Lawrence, and Fort Gibson railroad enters said Neosho valley, the State of Kansas hereby agrees to grant, bargain, and sell to said Atchison, Topeka, and Santa Fé Railroad Company all that portion of the lands granted to this State by the above-named act of Congress applicable to the construction of the herein-above described railroad and branch thereof, and which shall be selected and located in conformity with the provisions of the above-named act of Congress. And the said State does further agree, and it is hereby enacted, that whenever said Atchison, Topeka, and Santa Fé Railroad Company shall complete any twenty consecutive miles of either said road or branch, as required by

said act of Congress, the Governor of this State shall, by patent, convey to said Atchison, Topeka, and Santa Fé Railroad Company all the lands granted as aforesaid, and which shall be situated opposite to and within a limit of ten miles of the line of said section of road thus completed, extending along the whole length of said completed section, and no further, and so, from time to time, until said road and branches shall be completed, as required by said act of Congress; and whenever said road and branch shall be thus completed, the Governor of this State shall convey to said company all the remaining lands granted by said act of Congress, and applicable to the construction of said road and branch: *Provided, however*, That said agreement for the sale of said lands, and all conveyances thereof, shall be for the uses and purposes, and subject to the conditions, reversions, and provisions set forth and contained in said act of Congress and in this act: *And provided further*, That if the Congress of the United States shall, on or before the fourth day of March, 1866, consent that the Neosho Valley branch of the above-named road may be extended so as to intersect the Union Pacific Railroad, eastern division, at or near Fort Riley, and shall make a grant of land for such extension, of like amount with that granted per mile for the construction of the herein above-named principal road, then said Atchison, Topeka, and Santa Fé Railroad Company shall proceed to construct such branch to such intersection, on the terms and conditions herein above prescribed, applicable to the construction of such main road.

"SEC. 4. Each of said companies shall file in the office of the Secretary of the State, within six months after the passage of this act, a copy of the acceptance by the board of directors of such company, of the provisions of this act, duly certified under the seal of said company; and, in default thereof, all grants and provisions herein contained shall, as to the company so failing, cease and be void.

"SEC. 5. Said companies shall, respectively, within one year after its road shall have been definitely lo-

cated, file in the office of the Secretary of the State a map or profile thereof, and of the land reserved or taken for the use of said road; and shall also file maps of the parts of such road and the lands in the register of deeds of the several count which such roads shall pass.

"SEC. 6. The right of way upon and acr belonging to this State, to a distance of o feet in width, together with the right to co use, upon such lands, all turnouts and wa is hereby granted to said companies, respectively, for the use of their respective roads.

"SEC. 7. Immediately after the passage of this act, the Secretary of State shall cause the same to be published once in the Topeka *Tribune*, and it shall thereafter be in force.

"Approved February 9, 1864."

VII. 1865—September 20: The "Union Pacific Railroad Company, Southern Branch," organized under general corporation law of Kansas. Name since changed to the "Missouri, Kansas, and Texas Railroad Company."

VIII. 1866—June 30: Debate in Senate on bill which became the act of July 26, 1866, in 14 Stat., 289.

Senator Pomeroy, in speaking of the bill which finally became the act of July 26, said:

"It is no new grant. Every acre has been granted in a previous bill, and this bill only consolidates the two grants."

IX. 1866—July 26: Congress passed "An act granting lands to the State of Kansas, to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas."—(14 Stat., 289.)

The following is the act under which the Missouri, Kansas, and Texas Railroad Company claims:

"AN ACT granting lands to the State of Kansas, to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas.—(14 Stat., 259.)

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purpose of aiding the Union Pacific Railroad Company, southern branch, the same being a corporation organized under the law of the State of Kansas, to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho river to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands thus indicated by the direction of the Secretary of the Interior shall be reserved and held for the State of Kansas, for the use of said company, by the said Secretary, for the purpose of the construction and operation

of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States: *And provided further*, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road.

"SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which by the aforesaid grant shall remain in the United States, within ten miles on each side of said road, shall not be sold for less than double the minimum price of public lands when sold: *Provided*, That actual bona fide settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *Provided, also*, That settlers under provisions of the homestead act, who make their settlement after the passage of this act, and comply with the terms and requirements of said act, shall be entitled, within the said limits of ten miles, to patents for an amount not exceeding eighty acres each.

"SEC. 3. *And be it further enacted*, That the grant of lands hereby made is upon condition that said company, after the construction of its road, shall keep it in repairs and use, and shall at all times transport troops, munitions of war, supplies and public stores upon its road for the Government of the United States, free from all cost or charge therefor to the Government, when required to do so by any department thereof. And the lands hereby granted shall inure to the benefit of said company, as follows: when the Governor of

any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States.

"SEC. 11. *And be it further enacted*, That any railroad company chartered under any law of the United States, or any State which may have been heretofore or shall hereafter be organized by any act of Congress of the United States, may connect, unite, and consolidate, with this railroad company, after the same shall be located to the valley of the Neosho or Grand rivers, upon just, fair, and equitable terms, to be agreed upon between the parties, as shall not be against the public interest, or the interest of the United States.

"Approved July 26, 1866."

X. 1866—August 14: Contract with General Land Office for survey of lands, and act July 20, 1868, appropriates payment. (15 Stat., 118, sec. 2–4.) See act 3d March, 1871.

XI. 1867—January 21: Osage treaty took effect. (14 Stat., 687.)

The material dates as to this are—

1. 1865—September 29: Concluded.

2. 1866—June 26: "Senate amendments" added, and, with these, ratification advised by Senate.

3. 1866—September 21: Indians accept "Senate amendments."

4. 1867—January 21: Proclaimed.

"ARTICLE 1. The tribe of the Great and Little Osage Indians, having now more lands than are necessary for their occupation, and all payments from the Government to them under former treaties having ceased, leaving them greatly impoverished, and being desirous of improving their condition by disposing of their surplus lands, do hereby grant and sell to the United States

the lands contained within the following boundaries, that is to say: Beginning at the southeast corner of their present reservation, and running thence north with the eastern boundary thereof, fifty miles, to the northeast corner; thence west with the northern line, thirty miles; thence south fifty miles, to the southern boundary of said reservation, and thence east with said southern boundary to the place of beginning: *Provided*, That the western boundary of said land herein ceded shall not extend further westward than upon a line commencing at a point on the southern boundary of said Osage country, one mile east of the place where the Verdigris river crosses the southern boundary of the State of Kansas. And in consideration of the grant and sale to them of the above-described lands, the United States agree to pay the sum of three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians, in the treasury of the United States, and interest thereon at the rate of five per centum per annum shall be paid to said tribe semi-annually, in money, clothing, provisions, or such articles of utility as the Secretary of the Interior may from time to time direct. Said lands shall be surveyed and sold under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, *[including any act granting lands to the State of Kansas, in aid of the construction of a railroad through said lands,] but no pre-emption claim or homestead settlement shall be recognized; and after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the treasury of the United States to the credit of the "civilization fund," to be used under the direction of the Secretary of the Interior for the education and civilization of Indian tribes residing within the limits of the United States.

*The words in brackets are the "Senate amendment" of 26th June, 1866.

[Articles 3, 5, 6, 8, and 9 each give lands to sundry persons named for various purposes.]

"ARTICLE 4. All loyal persons being heads of families and citizens of the United States, or members of any tribe at peace with United States, having made settlements and improvements as provided by the preemption laws of the United States, and now residing on the lands provided to be sold by the United States, in trust for said tribe, as well as [upon] the said lands herein granted and sold to the United States, shall have the privilege, at any time within one year after the ratification of this treaty, of buying a quarter section each, at one dollar and twenty-five cents per acre; such quarter section to be selected according to the legal subdivision of surveys, and to include, as far as practicable, the improvements of the settler.

* * * * * *

"ARTICLE 11. It is agreed that all roads and highways laid out by the State or General Government shall have right of way through the lands herein reserved, on the same terms as are provided by law when made through lands of citizens of the United States; and railroad companies, when the lines of their roads necessarily pass through the lands of said Indians, *shall have right of way upon the payment of fair compensation therefor.*

"ARTICLE 12. Within six months after the ratification of this treaty the Osage Indians shall remove from the lands sold and ceded in trust, and settle upon their diminished reservation.

* * * * * *

"ARTICLE 17. Should the Senate reject or amend any of the above articles, such rejection or amendment shall not affect the other provisions of this treaty, but the same shall go into effect when ratified by the Senate and approved by the President."

There were 143 settlers under the 4th article of this treaty who took 22,197$\frac{14}{100}$ acres of land, and paid therefor $27,746 52.

XII. 1866—April 18: Whitney, attorney for Leavenworth, Lawrence, and Galveston Railroad Company, asked the Commissioner of the General Land Office to withdraw the lands from market.

1867—April 26: Commissioner declined, on the ground that the company "can acquire no rights whatever to the lands."

1867—April 29: Whitney renews and reargues request.

1867—May 17: Commissioner again refuses, and declares all the lands are to be sold in trust for purposes of treaty.

DEPARTMENT OF THE INTERIOR.
General Land Office, April 26, 1867.

SIR: * * * With reference to the right of the company to the odd sections within the limits of the land ceded by the Osage Indians to the United States, under treaty proclaimed January 21, 1867, I would state that the lands granted and sold to the United States by the 1st article of the treaty, are to be disposed of "on the most advantageous terms, for cash, and after reimbursing the United States the cost of survey and sale, and the sum of $300,000 placed to the credit of said Indians, the remaining proceeds of sale shall be placed to the credit of the civilization fund." * * * Hence, by the stipulations of the treaty, the railroad can acquire no rights whatever to the lands.

By the 11th article, railroad companies, when the lines of their roads necessarily run through the lands remaining to the Indians, shall have right upon payment of fair compensation therefor.

I am, sir, respectfully,
JOS. S. WILSON, *Commissioner.*

Major H. C. WHITNEY.

DEPARTMENT OF THE INTERIOR,
General Land Office, Washington, D. C., May 17, 1867.

SIR: I am in receipt of yours of 29th ultimo, referring to mine of 26th, in reference to the right of the Leavenworth, Lawrence, and Galveston Railroad Company to lands within the limits of the Osage Indian reservation, ceded to the United States by 1st article of treaty proclaimed January 21, 1867, and have read the argument filed with your letter.

The 1st article of the treaty *as amended* is as follows:

* * * "Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, [*including any act granting lands to the State of Kansas, in aid of the construction of a railroad through said lands,] †but no pre-emption claim or homestead settlement shall be recognized; and after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the treasury of the United States to the credit of the civilization fund," "to be used under the direction of the Secretary of the Interior for the education and civilization of Indian tribes residing within the limits of the United States."

In the opinion of this office, the terms of the treaty as above quoted, with the amendment, do not give the lands along the line of route in aid of the construction of the road; but, on the contrary, are so comprehensive as to require all of such lands to be sold in trust for the purpose specified in said treaty.

Therefore, the ruling in my former decision is adhered to; but if you desire the matter submitted to the appellate authority, it shall be done with pleasure, upon the receipt of your request to that effect.

I am, sir, very respectfully, your obedient servant,

JOS. S. WILSON, *Commissioner.*

HENRY C. WHITNEY, Esq.,
Attorney for Leavenworth, Lawrence, and Galveston Railroad, Lawrence, Kansas.

* Amendment. † Continuation from 1st article.

XIII. 1867—November 8: Secretary Browning, of Interior Department, reversed the ruling of Commissioner.

The ruling of Secretary Browning of November 8, 1867, does not seem to have had the Executive's approval. On the 20th of January, 1868, President Johnson issued a proclamation directing a public sale of all the Osage ceded lands to be made May 1, 1868.—(See XVII.) He made no exception in favor of the railroad companies. This was withdrawn April 18, 1868, on the request of the Representative in Congress from Kansas and others.—(See letter, *post*, XVII.)

The following is an extract from the

RULING OF THE SECRETARY OF THE INTERIOR, BROWNING, (November 8, 1867.)

[Extract.]

"These roads are to pass through portions of the lands described in the 1st article of the treaty, (the ceded lands.) The United States took no beneficial interest in the lands described in the 2d article, (the trust lands.) It constituted them a trustee with a naked power to sell and apply the proceeds arising therefrom in the manner therein set forth. The State, (of Kansas for the railroad companies,) claiming under the United States, takes no title to such lands. * * *

"At the time of the passage of said acts, the Indian title and rights of possession to the lands mentioned in the 1st article were not extinguished. Mr. Attorney General Black, in his opinion of 3d June, 1860, (9 Opinions, 346,) remarks: 'Nothing, it seems to me, can be clearer than this proposition, namely, that when a grant gives lands to a State, a corporation, or an individual for public purposes, all the title which the United States had at the time of the grant, or may afterwards acquire, vests in the grantee, unless the

grantee has done something in the meantime which stops him from claiming.' The grant, according to this opinion, attaches to the lands as soon as they are acquired, although *some authorities affirm that when a grantor has at the time of the grant no estate in the thing granted, a subsequently acquired title will not pass by force of the grant if there be no covenant or warrants annexed thereto.* In the case before Attorney General Black, the lands covered by the grant of 8th August, 1846, to the State of Wisconsin, were situated within the Stockbridge Indian reserve, the title to which was not extinguished until 1856.

"Does the 1st article of the treaty make a disposition of these lands which is inconsistent with the railroad grants, or which excludes expressly, or by implication, their operation and effect?

"Had the [1st] article of the Osage treaty been silent touching a sale of the ceded lands, *they would, on becoming a part of the public domain, have been subject to the legislation disposing of it, and in the view of Judge Black to any pre-existing grant of a portion of them for public uses.* The article is not so silent. It prohibits preemption settlements or homestead claims, and requires that the lands be surveyed and sold under existing laws, including any act granting lands to the State of Kansas, &c.

"The clause, 'including any act,' &c., did not form a part of the article when the treaty was signed, but was inserted by the Senate as an amendment. It seems to have been designed *to recognize by express stipulation the binding efficacy of prior grants, and to exclude any possible conclusion adverse to the rights thereby conferred,* had the article remained in its original shape.

"If the amendment has not this effect, it is entirely misplaced and unmeaning. Construing the article as it now appears in the treaty, I am of the opinion that any grant to the State of Kansas of the character named must be allowed as fully as if at the date thereof the United States were the proprietor of the land, freed from the incumbrance of the Indian title."

XIV. 1867—November: The Leavenworth, Lawrence, and Galveston Railroad Company made actual survey on the ground and location of road through Osage ceded lands, "and not before"—so says the answer filed to the bill.

XV. 1868—January 2: Map of definite location of Leavenworth, Lawrence, and Galveston Railway through the Osage ceded lands filed by the company in General Land Office.

That of the Missouri, Kansas, and Texas Railroad, January 7, 1868.

XVI. 1868—January 7: Map of definite location of Missouri, Kansas, and Texas Railroad filed in General Land Office.

XVII. 1868—January 20: President's proclamation No. 726, for sale of *all* these lands, "under treaty of September 29, 1865," to commence May 1.

1868—April 2: Hon. Sidney Clarke, M. C., in a letter to Commissioner General Land Office, asked postponement of sale "on behalf of settlers," because, he says: "The question of the disposal of these lands is now being considered by Congress, a bill having passed the House of Representatives relating to the subject, and it may require till near the close of the session to get final action. * * * With the question of the rights of the settlers undecided in Congress the sales would be attended with much excitement, &c. * * * Neither the interests of the Government, the Indians, or the settlers occupying the lands would be subserved," &c.

Senator Ross also requested postponement, for other reasons.

The whole subject was finally disposed of by requiring a sale of all lands, both *odd* and even-numbered sections, by the joint resolution of April 10, 1869.

1868—April 18: Notice by Commissioner of General Land Office, of postponement of sale as to *all* the lands.

XVIII. 1868—January 21: Letter of Commissioner of General Land Office to register and receiver of local land office at Humboldt—saying that by reason of the Secretary's construction of treaty they should withhold from sale the odd sections within railroad limits—received by register and acknowledged, February 4, 1868.

XIX. 1869—April 10: Joint resolution of Congress, for sale of all the lands, *odd* and even sections, to settlers, saving vested rights, (16 Stat., 55.) Under this, settlers entered odd sections at local land office. In 1872, Secretary of the Interior, at instance of railroad companies, cancelled the entries of settlers.

Under this joint resolution nearly 2,000 settlers entered, each in quarter sections, 314,220 acres of land, for which they paid the Government $454,072 10, besides fees of officers. And Governor Shannon says:

"Nearly all the rest of these lands have been settled upon; some under the joint resolution by persons who were not able to make payment within the two years it was in force, and others under the belief that the trust specified in the Osage treaty, that these lands were to be sold on the most advantageous terms for cash, would be carried out and executed by the Government, and that consequently they would be able to purchase their lands for cash when the Government executed the trust."

There were in all 3,365 "declaratory statements" filed by settlers on these lands under the joint resolution.

The joint resolution is as follows:

JOINT RESOLUTION OF APRIL 10, 1869, (16 Stat., 55.)

A RESOLUTION enabling bona fide settlers to purchase certain lands acquired from the Great and Little Osage tribe of Indians.

"*Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled,* That any bona fide settler residing upon any portion of the lands sold to the United States by virtue of the first and second articles of the treaty concluded between the United States and the Great and Little Osage tribe of Indians, September twenty-ninth, eighteen hundred and sixty-five, and proclaimed January twenty-first, eighteen hundred and sixty-seven, who is a citizen of the United States, or shall have declared his intention to become a citizen of the United States, shall be, and hereby is, entitled to purchase the same, in quantity not exceeding one hundred and sixty acres, at the price of one dollar and twenty-five cents per acre, within two years from the passage of this act, under such rules and regulations as may be prescribed by the Secretary of the Interior: *Provided, however,* That both the odd and even-numbered sections of said lands shall be subject to settlement and sale as above provided: *And provided, further,* That the sixteenth and thirty-sixth sections in each township of said lands shall be reserved for State school purposes in accordance with the provisions of the act of admission of the State of Kansas: *Provided, however,* That nothing in this act shall be construed in any manner affecting any legal rights heretofore vested in any other party or parties.

"Approved April 10, 1869."

XX. 1869—July 1: The Leavenworth, Lawrence, and Galveston Railroad Company mortgaged to the Farmers' Loan and Trust Company all their lands and property, &c. (Record, 65.)

XXI. 1869—July 20: Opinion of Secretary Cox, of Interior Department, expressing doubts whether there is any grant for railroads.

Secretary Cox, in his letter of instructions of July 20, 1869, very clearly indicates his opinion upon all the acts of Congress under which these companies claim, and of the treaty and "Senate amendment" also; and his opinion evidently is—

1. That the lands were "reserved" by the treaty of 1825, and were not subject to the grant in the act of 1863, and, of course, for the same and other reasons, not to the grant in the act of 1866.

2. That the "Senate amendment" did not relate to the act of 1866 at all, and only to the act of 1863 and other acts so far as relates "to the survey and sale of lands."

He says:

OPINION OF SECRETARY COX.

"The Senate amendment inserted after 'laws' the words 'including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands.' I have serious doubts whether those words can, by any just rule of interpretation, be construed to apply to any other provisions of such an act than those which relate to the survey and sale of lands. As, however, my predecessor, after full consideration, arrived at a different conclusion, I have not felt at liberty to disturb it, but as the point touching the rights of settlers was not, *in the form in which it is now presented*, decided by him, I must consider it.

* * * * * *

"Few, if any, persons were residing upon the tract at the date of the treaty; and the claim, if admitted, would absolutely exclude from pre-emption all the odd-numbered sections in said tract which are situate within the original or indemnity limits, if the settlement,

although prior to the withdrawal of the lands, was subsequent to the date of the treaty.

"The acts approved respectively 3d March, 1863, 25th and 26th July, 1866, make, it is claimed, the grants in question.

"The withdrawal of the lands was required by the last two acts, and they were approved after the amendment was adopted by the Senate, but before the assent of the Indians thereto was given, and the treaty proclaimed by the President.

"A treaty is binding upon the parties thereto from the date it is signed, unless it otherwise provides, and the ratification relates back to that time. It is therefore doubtful whether the amendment, 'including any act,' &c., embraced the two last acts.

"The Indians undoubtedly accepted it according to the fair import of its terms, and it, in connection with the words preceding, evidently refers only to *such laws as were existing or in force, if not at the date of the treaty*, certainly at the date when the amendment was adopted by the Senate.

"As the lands in question were reserved by the treaty of 1825, it is questionable whether anything more than a right of way over them passed under the first act."

XXII. 1870: Each of the two railroad companies claimed before the Secretary of the Interior *priority* of right to these lands.

The Missouri, Kansas, and Texas Railroad Company argued that the act of 1863 did not attach a grant because of the reservation therein, and that the "grant to Kansas for railroad purposes attached by virtue of the treaty," while the Leavenworth, Lawrence, and Galveston Railroad Company argued that the "lands which were *not grantable at the date of the law* became so before the date of location" of road.

The controversy was settled by an equal division of the lands within the limits of the railroad crossing.

In the argument on behalf of the Leavenworth, Lawrence, and Galveston Railroad Company, filed in the General Land Office in February, 1870, it is said:

"So far as the grants in the ceded tract are made, by acts of Congress, the Union Pacific Railway Company (southern branch) can claim only under the act of July 26, 1866, while the Leavenworth, Lawrence, and Galveston Railroad Company claims under the act of March 3, 1863.

"The first section of the act of 1863, (12 Stat., 772,) sets out by granting to the State for the construction of the Leavenworth, Lawrence, and Galveston Railroad alternate sections, for ten sections in width on each side of the road, from Leavenworth to the southern boundary of Kansas. Then follows the clause:

"'But, in case it shall appear that the United States have, *when the lines or routes of said road and branches are definitely fixed*, sold any sections or part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, *or that the same has been reserved by the United States for any purpose whatever*, then it shall be the duty of the Secretary of the Interior to cause to be selected other sections in place of those so disposed of.'

"From this it is clear that the question, whether the alternate sections in the ceded tract were granted by this law, depends on the status of those lands at the date when the line of the Leavenworth, Lawrence, and Galveston Railroad was located through them, and not on their status at the date of the law.

"Now, between the 3d March, 1863, when the law was enacted, and the 4th day of January, 1868, when the map of the definite location of the Leavenworth, Lawrence, and Galveston Railroad, through these lands, was approved by the Department, the treaty was made and ratified. It made these lands *public lands*. * * *

"That the treaty made these public lands to be disposed of as the Government saw fit, is held by the present Secretary of the Interior in his decision of July 20, 1869; was held by his immediate predecessor in his

decision of December 8, 1867; by the Senate when it amended the treaty *expressly* recognizing the railroad grant of March 3, 1863; and by the Executive and Congress in enacting the joint resolution of April 10, 1869, which resolution provides a mode of disposing of such of the lands as were not granted to the railroad in direct conflict with the mode prescribed in the treaty.

* * * * * *

"In other words, the character of the tract was changed from Indian lands to public land, between the date of the act and the definite location of the road, so that by the terms of the law a grant inured to the road through it. * * * * *

"By this provision the road gained, where, as in this case, *lands which were not grantable at the date of the law* became so before the date of location. * * *

"As the treaty conveyed the lands to the United States without reservation, and they became public lands before the Leavenworth, Lawrence, and Galveston Railroad was located through them, they would have been subject to the grant in the act of 1863, without the Senate amendment."

The argument then quotes the ruling of the Secretary of the Interior, (Browning,) of November 8, 1867.

There can be no doubt, then, that this Indian reservation is excepted from the railroad grant. And I do not stand alone in this view. In the argument of March, 1870, before the Commissioner of the General Land Office, already referred to, the distinguished counsel for the Missouri, Kansas, and Texas Company used the following language as applicable to this subject:

"We can conceive a state of facts under which the argument of the Lawrence, Leavenworth, and Galveston road, and the Attorney General's opinion quoted in support thereof, would be sound. If the congressional grant to the company had been absolute and unqualified, and if the treaty had, without restrictions or pro-

hibitions therein expressed, conveyed this tract to the United States, to be dealt with in all respects as other public lands, then the Lawrence, Leavenworth, and Galveston road might justly claim to have the better right by reason of elder grant from the intersection of the two roads, or from about the north line township 29 south, range 18 east. The act of August 8, 1846, upon which Attorney General Black's opinion was rendered, was an absolute grant to the State of Wisconsin *without reservation*, and the interfering Indian title was subsequently extinguished without conditions. It is clear that such a grant would pass all the unconditional title the United States might subsequently acquire. But such is not the present case. *The railroad grants to Kansas were coupled with a reservation*, and if that had not been distinctly released by the first amendment to the treaty, we do not see how the grants could have attached at all to the ceded lands. Suppose that said amendment had not been adopted, could it be held that the grant of 1863 attached to these lands? Would Attorney General Black's opinion be then applicable? Clearly not. Then the grant to Kansas for railroad purposes attached in these ceded lands by virtue of the treaty, and not by force of the acts of Congress theretofore passed."

XXIII. 1870—July 15: Indian appropriation act (16 Stat., 362, sec. 12) provides for the removal of the Osage Indians when they agree, "and to defray the expenses of said removal" money is appropriated, "to be reimbursed to the United States from the proceeds of the sale *of the lands of the said Indians*."

See Wood *vs.* M. K. and T. R. R. Co., 11 Webb, Kansas, 347.

XXIV. 1871—April 19: Congress passed "an act to enable the Leavenworth, Lawrence, and Galveston Railroad Company to relocate a portion of its road." (17 Stat., 5.) This is as follows:

THE THAYER ACT OF APRIL 19, 1871, (17 Stat., 5.)

AN ACT to enable the Leavenworth, Lawrence, and Galveston Railroad Company to relocate a portion of its road.

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the Leavenworth, Lawrence, and Galveston Railroad Company, for the purpose of improving its route and accommodating the country, may relocate any portion of its road south of the town of Thayer, within the limits of its grant, as prescribed by the act of Congress entitled "An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State," approved March third, eighteen hundred and sixty-three, but not thereby to change, enlarge, or diminish said land grant.

"Approved April 19th, 1871."

XXV. 1871—September 21: Governor of Kansas certified to the Secretary of the Interior that the Leavenworth, Lawrence, and Galveston Railroad "has been completed and equipped as required by act of Congress of March 3, 1863," and of the Legislature of February 9, 1864, (Record, p. 4;) and that map of the road had been filed, &c.

XXVI. 1871—Secretary of Interior certified to the Governor list of the odd sections of lands within the railroad limits, as indicated on the map, referred to in Governor's certificate of 21st September, 1871.

XXVII. 1872—April 8: and

1873—March 21: Patents issued to the Leavenworth, Lawrence, and Galveston Railroad, by the Governor, for the lands mentioned in the bill.

THE ARGUMENT.

In presenting this case, it is proper to state some *preliminary propositions*, and then to discuss the act of 1863, the Osage treaty of 1865, the "joint resolution" of April 10, 1869, and the "Thayer act" of April 19, 1871.

PART I.

PRELIMINARY PROPOSITIONS.

PROPOSITION I.

When Congress makes a grant of defined lands to a State, to aid in the construction of a railroad, and officers are authorized to give evidence of title to a company having constructed it, if such officers undertake to give such evidence of title to lands not so granted, their acts are not merely voidable, but are absolutely void.

Upon this proposition the following authorities are submitted:

1 Opinions Attorneys General, 420.
2 Opinions, 186.
5 Opinions, 9.
Wilcox *vs.* Jackson, 13 Peters, 498.
State *vs.* Miller, 3 McLean, 151.
Stoddard *vs.* Chambers, 2 Howard, 284.
Brown *vs.* Clements, 3 Howard, 650.
Kissel *vs.* St. Louis School, 18 Howard, 18.
Minter *vs.* Crommelin, 18 Howard, 87; S. C., 9 Ala., 594.
Easton *vs.* Salisbury, 21 Howard, 431.
Hall *vs.* Gaines, 22 Howard, 144.
Lindsey *vs.* Humes, 2 Black, 554.

State *vs.* Bachelder, 1 Wallace, 109; 5 Minn., 223.
U. S. *vs.* Stone, 2 Wallace, 525.
Richart *vs.* Phelps, 6 Wallace, 160.
Railroad Co. *vs.* Smith, 9 Wallace, 96.
Jackson *vs.* Lawson, 10 Johns., 26.
People *vs.* Livingston, 8 Barb., S. Ct., 253.
Hunter *vs.* Hemphill, 6 Miss., 106.
Perry *vs.* O'Hanlan, 11 Miss., 585.
Wright *vs.* Rutgers, 14 Miss., 585.
Hit-tuk-ho-mi *vs.* Walls, 7 S. & M., 363.
Gaston *vs.* Canada, 39 Mo., 357.

This, in fact, is determined by Congress in the acts providing for the return of purchase money in case of unauthorized sales. (Acts 3d March, 1819; May 21, 1824; January 12, 1825; May 24, 1828; 1 Lester, 34, 36, 38, 40, 667.)

If, therefore, the Railroad Company was not entitled to any of the Osage ceded lands, the certified lists of lands in this tract furnished by the Secretary of the Interior to the Governor of Kansas, and the patents issued by him to the company, are all void, and should be so declared and cancelled.

Proposition II.

Where officers, in executing laws relating to the disposal of the public lands of the United States, or of lands held in trust for sale, have, without authority of law, issued evidence purporting to convey the title to such lands, or where a grant of such lands is claimed by force of a law, the United States may, in such cases, in their own name, by direction of the Attorney General, maintain a bill in

equity to cancel such evidence of title, and to enjoin claimants from asserting title.

In support of this the following authorities are submitted:

O'Brien *vs.* Perry, 1 Black, 139.
Lindsay *vs.* Hawes, 2 Black, 554.
Bagnell *vs.* Broderick, 13 Peters, 436.
State of Minnesota *vs.* Bachelder, 1 Wallace, 115.
United States *vs.* Stone, 2 Wallace, 525-536.
Hughes *vs.* United States, 4 Wallace, 235.
Johnson *vs.* Towsley, 13 Wallace, 72-91.
Opinions Attorney General Legare, Nov. 26, 1842, 1 Lester, 659.
Seward *vs.* Hicks, 1 Har. & McHenry, 24.
Lord Proprietor *vs.* Jennings, Idem, 92.
The King *vs.* Vernon, 3 Levine, 281.

In the case in 2 Wallace, 525, Mr. Justice Grier says:

"Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them, or where another party should have received the patent; in such cases the law will pronounce them void."

The court, then, has power in this suit to decree a cancellation of the certified lists of lands furnished by the Secretary of the Interior to the Governor of Kansas, and the patents by him issued to the railroad company.

PROPOSITION III.

The provisions of an act of Congress or of a treaty making a grant of lands, or authorizing a conveyance thereof, in the nature of a bounty, in aid of the construction of a railroad by a State or corporation are to be construed most strictly against the grantee. Whatever is not

given expressly, or very clearly implied from the grant, is withheld. If there be any doubts from any obscurity in the grant, it is to be resolved as conclusive against the grant.

The language of Indian treaties is not to be construed to the prejudice of the Indians. If a doubt arises, it is to be construed in their favor.

RULES FOR CONSTRUING BOUNTY-LAND-GRANT ACTS.

The rules for construing bounty-land grants are well understood. It will only be necessary to refer to some of the cases in which they are stated and applied.

On the 22d of November, 1858, Attorney General Black thus stated the law. He says:

"It is well settled that all public grants of property, money, or privileges are to be construed most strictly against the grantee. Whatever is not *given expressly* or *very clearly implied* from the words of the grant, is withheld.

"If you let the grantees have the advantage of the ambiguity, acts which were supposed to have but very little in them when they passed will expand into very large dimensions afterward.

"An ingenious construction will make that mischievous which was intended to be harmless. The remedy for these evils—and they are evils to the public morals as well as to the treasury—is to let all men know that they can get nothing from the United States except what Congress has chosen to give them in words so plain that their sense cannot be mistaken."

In Charles River Bridge *vs.* Warren Bridge (11 Pet., 544) an act conferring corporate franchises was construed.

And the court say—

"The rule of construction in such cases is well settled, both in England and by the decisions of our own

tribunals. In 2 Barn. & Adol., 793, in the case of the Proprietors of the Stoarbridge Canal against Wheely and others, the court say, 'the canal having been made under an act of Parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this: *that any ambiguity in the terms of the contract must operate against the adventurers*, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act.' And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. * * * Borrowing, as we have done, our system of jurisprudence from the English law, and having adopted, in every other case, civil and criminal, its rules for the construction of statutes, is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle where corporations are concerned? * * * *

"Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle, and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication, and construing a statute more unfavorably to the public and to the rights of the community, than would be done in a like case in an English court of justice."

The rule applied in Mills et al *vs.* St Clair County, (8 Howard, 581,) is approved:

"That if the meaning of the words be doubtful in a grant designed to be a general benefit to the public, they shall be taken most strongly against the grantee and for the Government, and therefore should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed, and if these do not support the right claimed, it must fail."

In Richmond Railroad Company *vs.* Louisa Railroad Company, (13 Howard, 81,) the court say:

"Any ambiguity in the terms of the contract must operate against the corporation and in favor of the public, and the corporation can claim nothing but what is given by the act."

And see Perrine *vs.* Louisa Railroad Company, 13 Howard, 81.

Ohio Life and Trust Company *vs.* Debolt, 16 Howard, 435.

Southbridge *vs.* Whaley, 2 Barw. & Ad., 792.

Parker *vs.* Great Western Railroad Co., 7 M. & Gr., 253; 27 Pa., 339.

And the Supreme Court of the United States recognized this doctrine in the following language in Dubuque and Pacific Railroad Company *vs.* Litchfield, 23 Howard, 88:

"We concur with the following citation and reasoning of the plaintiff's counsel, to wit, Lord Ellenborough, in his judgment in Geldart *vs.* Gladstone, (1 East., 675:) 'If the words would admit of different meaning, it would be right to adopt that which is more favorable to the interests of the public, and against that of the company,' &c. The reason of the above rule is obvious; parties seeking grants for private pur-

poses usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language, for the purpose of taking, by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms."

And again it was said that—

"If the court had *any* doubts from *any* obscurity of the act of Congress, a settled rule of construction would determine the controversy. All grants of this description are strictly construed *against* the grantees. Nothing passes but what is conveyed in *clear and explicit language*, and, as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and if not thus expressed they cannot be implied."

In Rice *vs.* Railroad Company, (1 Black, 380,) the court review the previous authorities and hold that the later decisions regard the rule as settled—

"That public grants are to be construed strictly, and that nothing passes by implication."

Clifford, J., said:

"Taken together, these several cases may be regarded as establishing the general doctrine that whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation, and in favor of the public, and that nothing passes but what is granted in *clear and explicit terms*."

And see U. S. *vs.* Arredondo, 8 Peters, 738.

These rules were adopted and reaffirmed in the Binghampton Bridge case, (3 Wallace, 75,) and the

court said "that in grants by the public nothing passes by implication."

On the 15th of December, 1870, the Attorney General, on a question substantially similar, said:

"Where the transaction is an act of bounty, the construction should be in favor of the donor. I regard the aid to the Union Pacific Railroad Company as substantially an act of bounty on the part of the Government."

But it has been said that the act of 1863 makes a grant in "the enacting part of the law," and the exception from the grant is found in a *proviso;* that the rule of construction for which I have contended has no application to such cases as this, and that "he who relies on a *proviso* to take something out of that grant, must show that the language and intent of that proviso clearly do it," and for this there is cited—

U. S. *vs.* Dickson, 15 Peters, 165.

Thornhill *vs.* Hall, 2 Clark and Finlay's House of Lords' cases, 36.

It is a sufficient answer to this to say—

1. That the cases relied on have no application *to bounty-land grants.* The case of Thornhill *vs.* Hall was on the construction of a *will*, where it is the duty of the court to indulge *liberal construction* to give effect to devises.

In 1 Redfield on Wills, 420, it is said:

"From the earliest periods of the history of the English law there is manifested a disposition to apply a more favorable construction to wills than to ordinary legal instruments."

The case in 15 Peters was on the construction of a statute regulating official salaries where the courts indulge *liberal construction* in favor of the officer.

U. S. *vs.* Morse, 3 Story, R., 87.

Those cases, and the rule to which they refer, have no application to bounty-land-grant acts, which, as I have stated, are *sui generis.* As to them, the authorities already cited, and others, show that *if upon the whole of any statute, provisos and all taken together—*

"The court has *any* doubts from *any* obscurity of the acts of Congress, a settled rule of construction would determine the controversy."—(23 Howard, 88.)

In fact, *provisos* have especial efficacy in law. Sedgwick says the rule is—

"That when the proviso of an act of Parliament is directly repugnant to the main body of it the *proviso* shall stand, and be held a repeal of the purview, as it speaks the last intention of the makers."—(Construction of Stat., 62; Smith on Stat., 712; Sedgwick, 117; Dwarris, 514.)

2. But the exception from the alleged grant does not rest *alone* upon the *proviso.* The exception is found, not only in the *proviso*, but in "the enacting part of the law," both in the acts of 1863 and 1866. The "purview" or body of each act, in effect, makes a *present* grant, (not of the Osage but of other lands,) but inasmuch as it would be against the public interest to delay settlement of all the lands "until the line of road is definitely located," it recognizes the right of settlers as specially authorized by act of March 27, 1854, (10 Stat., 269,) to make up to that time "pre-emption or homestead settlements," and declares, in effect, that if *up to*

that time such settlements have been made, or if *prior to that time* and *at the date of the act* any land—

"Has been [at such date] reserved BY the United States for *any purpose whatever*, then it shall be the duty of the Secretary of the Interior to cause to be selected * * * from the public lands of the United States,"

for the Railroad Company other "indemnity land" in lieu of the lands so taken.

This particular question cannot be very important now, because *there is no ambiguity or doubt which can arise* on the *proviso*.

It is a clear unequivocal *reservation* of the Osage lands from any grant, as will be shown hereafter.

3. And the argument which follows, it is believed, fully shows that no grant has been made in the enacting part of the law or in any part thereof.

And by the rules of construction already presented, if there be any doubt upon that subject the grant fails.

RULES FOR CONSTRUING TREATIES.

When a grant is claimed under an Indian treaty, the same rules of construction operate against it as against any other law.

But there is superadded to this the further rule that the language used in Indian treaties shall never be construed to their prejudice.

In Worcester *vs.* Georgia, (6 Peters, 582,) Chief Justice Marshall says:

"The language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more ex-

tended meaning than their plain import as connected with the tenor of their treaty. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

In construing a treaty made with the Choctaws, Chief Justice Taney, then Attorney General, said:

"In an instrument of this sort, and made with such persons as the Choctaws, I do not think that strict and technical rules should be applied to it. It ought to be expounded liberally, according to the spirit, so as to give the Indians all the advantages and facilities for their removal which seems to have been contemplated by THE GENERAL SCOPE AND SPIRIT OF THE TREATY."
2 Op. Attorney General, 467.

In the case of The Kansas Indians, (5 Wallace, 737,) a part of the syllabus is as follows:

"Rules of interpretation favorable to the Indian tribes are to be adopted in construing our treaties with them. Hence, a provision in an Indian treaty which exempts their lands from 'levy, sale, and forfeiture,' is not, in the absence of expressions so to limit it, to be confined to levy and sale under ordinary judicial proceedings only, but it is to be extended to levy and sale by county officers, also for non-payment of taxes." (4 Mass., 144.)

And certainly this should be so, in a treaty made with the "poor Indian," whose "untutored mind" could not be supposed to grasp the idea of a railroad grant *where no such company is mentioned and no grant named.*

The Osage treaty is signed by "Black Dog, his + mark," "White Hair," "Little Beaver," and "Met-So-Shin-Ca"—all with their illiterate mark. The idea that they could extract out of vague phrases a railroad grant, where none was named, nor a railroad mentioned,

except for right of way, which was named with nothing to indicate that more was intended, and where cabinet ministers and Government officers and railroad attorneys could see none, is beyond human credulity.

And certainly the land policy of the Government adopted in the homestead and pre-emption acts ought not to be limited or defeated by construction in favor of corporations or individuals.

Now, with these rules to guide us, we are prepared to see if any of the Osage ceded lands have been granted to the State of Kansas, or to any railroad company, in language "*explicit and clear*," without requiring "ingenious interpretation and insinuation" from "ambiguous language."

I affirm there is no such grant. If I am correct in *any one* of the reasons I may present in opposition to the alleged grant, it must fail.

PART II.

GENERAL PROPOSITION.

THE ACT OF CONGRESS OF MARCH 3, 1863, (12 Stat., 772,) MADE NO GRANT OF ANY OF THE OSAGE INDIAN RESERVATION.

DIVISION I.

The last proviso of section one expressly reserves the Osage lands from the grant.

DIVISION II.

The act made a grant IN PRÆSENTI *in the lands not excepted from the operation of the act. This was not of*

a fee subject to the Indian right of occupancy, but of a perfect title. Hence the grant was not intended to include the Osage lands not then owned by the United States.

DIVISION III.

The general terms of the grant in the act of 1863, *independently of its* PROVISO *exception, were not designed to apply to any lands but those which were* "PUBLIC LANDS" *at its* DATE; *and hence the Osage lands, not then being "public lands," did not fall within the grant.*

DIVISION IV.

The "indemnity clause" of the act of 1863 *does not make a* FUTURE GRANT *of lands* "RESERVED" *from grant at* ITS DATE.

ARGUMENT.

This is, perhaps, the most important proposition in this case. I will, therefore, first present the essential parts of the most material section of the act, then state the claim made by each party as to its proper construction, and then submit some of the reasons in support of the theory that the act makes no grant in the Osage reservation.

A part of section one of the act is as follows:

"*Be it enacted, &c.*, That there be, and is hereby, granted to the State of Kansas, for the purpose of aiding in the construction: First, of a railroad and telegraph from the city of Leavenworth, by way of the town of Lawrence, and *via* the Ohio City crossing of the Osage river, to the southern line of the State in the direction of Galveston Bay, in Texas, with branches, &c., *every alternate section of land, designated by odd numbers, for ten sections in width on each side of said*

road and each of its branches. But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purpose aforesaid, from the PUBLIC LANDS *of the United States nearest to tiers of sections* above specified, so much land, in alternate sections or parts of sections, *designated by odd numbers*, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of pre-emption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers and selected by the direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid: *Provided*, That the land to be so selected shall, in no case, be located further than twenty miles from the lines of said road and branches: * * * *And provided further, That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose* of aiding in any object of internal improvement, *or for any other purpose whatsoever, be*, and the same *are hereby reserved to the United States from the operation of this act*, except so far as it may be found necessary *to locate the routes of said road and branches through such reserved lands;* in which case the right of way only shall be granted, subject to the approval of the President of the United States."

It is agreed on all hands that, at the date of this act, the Osage lands were an Indian reservation, so made by the treaty of 1825, and not "public lands."

The claim of the United States, then, is—

1. *That, by the act of* 1863, *Congress intended only to dispose of lands which,* AT ITS DATE, *were "public lands,"*

and so made a grant IN PRÆSENTI absolute, and with no provision enlarging it in case the Indian title should be extinguished, and that this never was extinguished but conveyed to the United States by treaty to be sold for the benefit of the Indians.

II. That the clause which refers to the time "when the lines or routes of said road and branches are definitely fixed," and known as the "indemnity clause," has no reference to the time when the grant shall take effect, but only gives the right to "indemnity lands" and fixes the time when the Secretary of the Interior shall select them.

On behalf of the Railroad Companies it has been urged, as I understand it, either—

I. That the act made a present grant of the fee subject to the Indian right of occupancy, to be enjoyed when it was extinguished, or—

II. That it intended to grant such lands as might thereafter be public lands at the time "when the lines or routes of said road and branches were definitely fixed," and that, when so fixed, these lands were "public lands" of the United States.

These claims on behalf of the Railroad Companies are inconsistent, and I do not know that the first is relied on. I will, therefore, state the claim of the Railroad Company in the words of its counsel on former occasions. In the argument of February, 1870, it was thus stated:

"Now, between the 3d March, 1863, when the law was enacted, and the 4th day of January, 1868, when the map of the definite location of the Leavenworth, Lawrence, and Galveston Railroad, through these

lands, was approved by the Department, the treaty [proclaimed January 21, 1867] was made and ratified. It made these lands *public lands.* * * * *

"In other words, the character of the tract was changed from *Indian lands* to *public land*, between the date of the act and the definite location of the road, so that by the terms of the law a grant inured to the road through it. * * * * *

"By this provision the road gained, where, as in this case, *lands which were not grantable at the date of the law* became so before the *date of location.* * * *

"As the treaty conveyed the lands to the United States without reservation, and they became *public lands* before the Leavenworth, Lawrence, and Galveston Railroad was located through them, they would have been subject to the grant in the act of 1863, without the Senate amendment."

In the argument of December, 1871, before the Secretary of the Interior, Judge Thatcher said:

"The grant did not operate until the road was located, and then only on such land as *then* appeared to be unappropriated by the Government. It is admitted that when this location took place these Osage ceded lands *had lost their Indian title and character.* From thenceforth they are treated as public lands by the Government."

Judge Curtis said:

"It was only when the location was filed that this grant began to operate upon any particular land. Now, when that location was filed, this Osage title had been extinguished."

Assistant Attorney General Smith adopted this as his opinion.

What are "Public Lands?"

From this statement, it will be seen, it is a matter of importance to define what are "public lands" of the United States. In the nomenclature of our land sys-

tem there is a wide difference between "Government lands" and "public lands." The grounds owned by the United States, on which are public buildings, military reservations, Indian reservations, lands set apart as parks, or devoted to any particular purpose, may be "Government lands" held absolutely or in trust, but they are not "public lands."

For the purposes of Congressional grants in aid of railroads, in the form the acts have been passed, none of the Government lands are "public lands," but *those owned absolutely by the United States, in their own right, and for their own purposes, which have not been devoted to any purpose or use whatever, in pursuance of an act of Congress or of treaty stipulation, and which are held for disposition by public sale, private entry, or otherwise.*

This is shown by the authorities and the common understanding through the whole history of railroad grants.

In August, 1852, Congress passed a bill (10 Stat., 28) making a grant of the right of way for roads, &c., through the "public lands." The President asked the opinion of the Attorney General as to the effect of it, and he said:

"All the grants made by the bill are expressly confined to the 'public lands' of the United States, and that designation would not include either land which the United States had purchased or land which they had reserved or appropriated out of the public domain for any of the purposes indicated in your letter, or *for any purpose whatever.*"

In Spalding *vs.* Martin, (11 Wisconsin, 262,) the court refer to the fact that the Government had in various forms set apart lands for certain public uses and for

reservations, while others had been granted away, and had been authorized to be sold at public sale, and by private entry, by acts of Congress, and in reference to lands so authorized to be disposed of, the court say:

"The phrase 'public lands' has a well known signification *limited to these only.*"

And this is limited to lands owned *absolutely* by the United States, and does not extend to those held under treaties, to be sold for the benefit of the Indians.

To the same effect is Wilcox *vs.* Jackson, 13 Peters, 498.

The opinion of the Attorney General as to the Chickasaw lands proves that lands conveyed by Indian treaty to the United States to sell are *not* "public lands."—(See section 4, *post.*)

But Congress has given a definition of "public lands" which is good as a legislative exposition. The 9th section of the act July 26, 1866, (*ante*, page 31,) makes a railroad grant through the Indian Territory, as the act says,

"Whenever the Indian title shall be extinguished, provided that the said lands became a part of the public lands of the United States."

Here are two contingencies to give effect to the grant, (1,) that the Indian title shall be extinguished, and (2) that the lands shall become "public lands."

In the view of Congress they did *not* become public lands merely when the Indian title was extinguished. If this was done by treaty requiring a sale of the lands according to the usage in many treaties, then they would not become "public lands." They would only become so by a treaty which would make them the *absolute*

property of the United States without a condition of sale or other trust annexed for the benefit of the Indians. Nearly all our Indian treaties for many years have conveyed the Indian title to the United States *as the Indian* title to sell for the benefit of the Indians.

When the act of March 3, 1863, was passed, the Osage lands were not "public lands."

AND CONGRESS ONLY INTENDED BY THE ACT OF 1863 TO MAKE A GRANT IN AID OF RAILROADS IN SUCH LANDS AS WERE "PUBLIC LANDS" AT ITS DATE, FOR MANY REASONS, SOME OF WHICH I WILL STATE, AS FOLLOW:

DIVISION I.

The last proviso of the act of 1863 *expressly reserves the Osage lands from the grant.*

This I proceed to show.

SECTION 1. Its language is:

"*And provided further*, That any and ALL LANDS HERETOFORE RESERVED TO THE UNITED STATES, by any act of Congress, or IN ANY other MANNER, by competent authority, for the purpose of aiding in any object of internal improvement, or for ANY OTHER PURPOSE WHATSOEVER, be and the same are HEREBY RESERVED TO THE UNITED STATES FROM THE OPERATIONS OF THIS ACT, except so much as may be found necessary to locate the routes of said road and branches, THROUGH SUCH RESERVED lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

The word "reserved" construed:

The words of the act, "*reserved for any purpose*," were employed for the purpose of excepting Indian *reservations* from these acts.

First. This is so because they could not apply to any lands but these and the Ottawa reserve. *There was no reservation but these* to which they could apply in Kansas, and it is a rule of construction that *some effect* shall be given to *all* the words of an act where it is practicable. The proviso was inserted for *some* purpose. What *other* could it have?

Second. They are substantially the words employed in other acts and treaties to except from their operation lands in Indian occupancy.

The treaty of 1825 cedes lands, and then says:

"Within the country above ceded there shall be *reserved* to and for the Great and Little Osage tribe or nation aforesaid, so long as they may choose to occupy the same," [these very lands.]

The Osage treaty of 1865 describes a portion of the Osage lands as the "diminished *reservation*."—(Art. 16.)

The act of July 15, 1870, for the sale of these lands, uses the same terms.

The treaty of the "Seven Nations," of May 31, 1796, provides that—

"The tract, equal to six miles square, *reserved* in the sale made by the commissioners of the land office of said State, &c., shall still remain so reserved."

The Seneca treaty of September 15, 1797, says:

"All such pieces of land as are hereby *reserved* * * shall be laid off * * * at the villages where such reservations are made."

By the Cherokee treaty of July 8, 1817, the Cherokees "cede to the United States * * * all *reservations* made to Doubleday and others which were *reserved* to them by a treaty made," &c.

The pre-emption act of 1841 excepts "lands included in any *reservation*, by any treaty, law, or proclamation."

The terms "reservation," "lands reserved," are employed to designate lands excepted from grants in many treaties, laws, and decisions.—(United States *vs.* Fitzgerald, 15 Peters, 420; Clements *vs.* Warren, 26 Howard, 397.)

And see statutes cited in Morton *vs.* Green, 2 Nebraska, 450.

In the argument of March, 1870, before the Commissioner of the General Land Office, already referred to, the distinguished counsel for the Mississippi, Kansas, and Texas Company, declared that—

"The railroad grants to Kansas were coupled with a *reservation*."

In looking for the meaning of this *proviso* we should bear in mind the rule of construction that no grant can be upheld, if on the words making a grant there is "*any* doubt."

The correlative of this rule is that the *proviso* is to be so construed as to except *all from the grant which its language will reasonably admit.*

In Rice *vs.* Railroad Company, (1 Black, 378,) it is said:

"When the words of a statute are ambiguous or the meaning doubtful, the established rule of construction is, that the intention must be deduced *from the whole statute and every part of it.*"—(1 Kent's Com., 462.)

It is a necessary result of the rule itself. Now, the Osage lands had been "reserved" "by competent authority"—the treaty of 1825. They were, by this treaty, "reserved to and for the Great and Little Osage tribes

or nations so long as they may choose to occupy the same."

It is important to note the fact, already stated, that there was *no other reservation* to which this proviso could refer but to an Indian reservation. The Leavenworth military reservation was some three miles north of the beginning point of the railroad, and the Osage reservation and the Ottawa reserve were the only lands to which the proviso could apply.—(See *ante*, p. 14.) But if there had been *other* reserved lands, the proviso excepts from the grant *all* such lands, and so excepts the Osage reservation. The *proviso*, then, was designed to apply to the Osage reservation.

This is all the more certain because the lands reserved were those "*through*" which the roads were to pass. And there was no other reservation but Indian reservations for the road to pass "*through*," and which, as the proviso says:

"Are hereby reserved and excepted from the operations of this act except so far as it may be necessary to locate the route of said road *through such reserved lands*, in which case the right of way, 200 feet in width, is hereby granted, subject to the approval of the President."

The right of way was given "subject to the approval of the President," because he was authorized to negotiate by treaty with the Osages, and might arrange that subject with them by the time the railroad companies could use a right of way. There were no other lands over which the President could exercise any authority. And the Osage treaty, proclaimed January 21, 1867, did secure the right of way.—(Art. 11.)

The same section which does so, calls *these* lands "*the*

lands of said Indians" even then, and shows further, by providing for the right of way, that the Indians did not intend the railroad companies to have any other rights, for no other was named in the treaty.

SECTION 2. The proviso took effect *at the date of the act*, and all lands *then* within its exception *continued forever reserved.*

This is our claim.

In opposition to this, it was said by Judge Curtis that—

"It was only when the location [of the road] was filed that this act began to operate upon any particular land, and of course it was only when the location was filed that this proviso could operate to take anything out of the operation of this act. Now, when that location had been filed, this Osage title had been extinguished."—(Argument, &c., 1871, p. 7.)

a. It will elsewhere be shown that the act of 1863 made a grant *in præsenti;* and this is a complete answer to the construction of the proviso maintained by Judge Curtis.—(8 Opinions, 257; 11 Opinions, 47; Railroad Co. *vs.* Smith, 9 Wallace, 95; Burlington and Missouri Railroad Co. *vs.* Fremont County, 9 Wallace, 89–99; Rice *vs.* Railroad Co., 1 Black, 359; Rutherford *vs.* Green, 2 Wheat., 196; 1 Lester, 512, 523, 537, 549, 564; 2 Lester, 386; Armstrong *vs.* Morrell, 14 Wallace, 120.)

b. It is a rule well understood, "that every law takes effect on the day of its passage."—(Matthews *vs.* Zane, 7 Wheat., 164; The Ann, 1 Gallison, 62; 1 Kent, 455; Sedgwick Stat., 2d ed., 67.)

"In expounding a grant, according to its intent, it

must be done according to the intent at the time of grant."—(4 Bacon's Abr., 526.)

"A statute referring to, or affecting, persons, *places*, or *things*, is limited in its operation to persons, places, and things as they existed at the time the statute was passed."—(U. S. *vs.* Paul, 6 Peters, 141; Hall *vs.* State, 20th Ohio, 16; Kendall *vs.* U. S., 12 Peters, 527; Mobile *vs.* Eslave, 16 Peters, 234; Mobile *vs.* Hallet, 16 Peters, 261; 9 Wallace, 95; 4 Bacon's Abr., 526.)

If there be a doubt as to the *time* when the *proviso* takes effect, it must, by the rules of construction stated, be so resolved as to exclude a grant. Now, in the face of these authorities and principles, it is a *mere assumption* to say that the *proviso could not operate until the grant began to operate*, even if the grant was to take effect *in futuro*.

Why could not the *proviso* operate at the date of the act and prospectively perpetual?

Congress has by this act said to the Railroad Company—

"We make you a present grant of land, but from this we except the Osage reservation forever."

And Congress could also say—

"We make a grant for railroads of land to be selected when their lines are located, but from this we *now* and *forever* except what is now the Osage reservation."

The *proviso* CAN and *does* operate from the date of the act. *It is in præsenti.*

A reservation excepting lands from a grant is quite different from *the* grant. A grant may be so made as to be inchoate—may take effect *in futuro*, but a reservation may operate absolutely at its date. And the

lands of said Indians" even then, and shows further, by providing for the right of way, that the Indians did not intend the railroad companies to have any other rights, for no other was named in the treaty.

SECTION 2. The proviso took effect *at the date of the act*, and all lands *then* within its exception *continued forever reserved.*

This is our claim.

In opposition to this, it was said by Judge Curtis that—

"It was only when the location [of the road] was filed that this act began to operate upon any particular land, and of course it was only when the location was filed that this proviso could operate to take anything out of the operation of this act. Now, when that location had been filed, this Osage title had been extinguished."—(Argument, &c., 1871, p. 7.)

a. It will elsewhere be shown that the act of 1863 made a grant *in præsenti;* and this is a complete answer to the construction of the proviso maintained by Judge Curtis.—(8 Opinions, 257; 11 Opinions, 47; Railroad Co. *vs.* Smith, 9 Wallace, 95; Burlington and Missouri Railroad Co. *vs.* Fremont County, 9 Wallace, 89–99; Rice *vs.* Railroad Co., 1 Black, 359; Rutherford *vs.* Green, 2 Wheat., 196; 1 Lester, 512, 523, 537, 549, 564; 2 Lester, 386; Armstrong *vs.* Morrell, 14 Wallace, 120.)

b. It is a rule well understood, "that every law takes effect on the day of its passage."—(Matthews *vs.* Zane, 7 Wheat., 164; The Ann, 1 Gallison, 62; 1 Kent, 455; Sedgwick Stat., 2d ed., 67.)

"In expounding a grant, according to its intent, it

must be done according to the intent at the time of grant."—(4 Bacon's Abr., 526.)

"A statute referring to, or affecting, persons, *places*, or *things*, is limited in its operation to persons, places, and things as they existed at the time the statute was passed."—(U. S. *vs.* Paul, 6 Peters, 141; Hall *vs.* State, 20th Ohio, 16; Kendall *vs.* U. S., 12 Peters, 527; Mobile *vs.* Eslave, 16 Peters, 234; Mobile *vs.* Hallet, 16 Peters, 261; 9 Wallace, 95; 4 Bacon's Abr., 526.)

If there be a doubt as to the *time* when the *proviso* takes effect, it must, by the rules of construction stated, be so resolved as to exclude a grant. Now, in the face of these authorities and principles, it is a *mere assumption* to say that the *proviso could not operate until the grant began to operate*, even if the grant was to take effect *in futuro*.

Why could not the *proviso* operate at the date of the act and prospectively perpetual?

Congress has by this act said to the Railroad Company—

"We make you a present grant of land, but from this we except the Osage reservation forever."

And Congress could also say—

"We make a grant for railroads of land to be selected when their lines are located, but from this we *now* and *forever* except what is now the Osage reservation."

The *proviso* CAN and *does* operate from the date of the act. *It is in præsenti.*

A reservation excepting lands from a grant is quite different from *the* grant. A grant may be so made as to be inchoate—may take effect *in futuro*, but a reservation may operate absolutely at its date. And the

proviso to the acts of 1863 does expressly operate at its date. Its language is—

"That all lands heretofore reserved * * * for any purpose whatever, be and the same *are hereby* [now] reserved * * from the operation [grant] of this act."

If stronger, plainer language can be used to affirm a present and continuing exception from the grant, I would be glad to see it written out. And this accords with "the enacting part of the law," which provides for the *future* selection of indemnity lands in lieu of land which "*has been* reserved *by* the United States."

c. The *words* of the *proviso* make it take effect *at its date* and *continue perpetually.*

The law is indeed "clear and explicit." It declares—

"That all lands heretofore *reserved* for any purpose be, and the same are HEREBY, reserved to the United States FROM THE OPERATION OF THIS ACT."

Now let us inquire—When are such lands reserved?

The law answers, "hereby reserved"—that is, *now* reserved.

How long reserved?

The law answers, "reserved from the operation of this act"—forever reserved, no exception, no matter *when* "the operation of this act" begins, so far as it makes a grant; the *proviso* operates "*hereby*," *now*, and *forever.*

The lands reserved are not affected by the grant.

But if the lands cease to be an Indian reservation—if the Indian title shall be extinguished, does the *proviso* cease to operate?

The law says no such thing. It cannot be so construed without adding words not found in the act.

The *proviso* never ceases to operate as against the grant.

If the act *operates* to *attach* a grant when the line of road is fixed, this, as well as the grant, is an *operation* of the act; and the proviso reserves the Osage land "from the operation of the act"—that is, from its operation in every respect.

d. The *object* of this statutory reservation or exception from the grant was to avoid *an Indian war* by a sale of lands in their occupancy, and to keep the Government in a position to dispose of the lands as justice to the Indians might require and the interest of settlers might demand.

The idea that Congress would, in advance, and while the Osages occupied these lands, make even a contingent or possible grant of their lands would imply that Congress did not intend to keep the faith pledged by the treaty of 1825, that the Indians might occupy the lands "so long as they choose."

It would be a menace provoking discontent among the Indians.

e. But this question is placed at rest by repeated decisions of this court, on similar provisos, in all of which they are treated as operating from the date of the acts respectively.

SECTION 3. But it is objected that the *proviso* cannot reserve these Osage lands from the grant because the treaty of 1825 had not previously reserved them "*to the United States*," but only to the Osage Indians.

The language of the *proviso* is—

"*That* any and *all lands heretofore reserved* (1) to the

United States by any act of Congress or (2) *in any* other *manner by competent authority*, for the purpose (1) of aiding in any object of internal improvement, or (2) *for any* other *purpose whatsoever*, be and the same *are hereby reserved*," &c.

The construction which denies that the *proviso* relates to any lands except those "reserved *to the United States*" is a mere *verbal criticism*, and is wholly inadmissible for several reasons:

a. It is not even good as a verbal criticism. As applied to the Osage lands it may, as a question of grammar, be read as I have italicised above—

"That all lands heretofore reserved * * * in any manner by competent authority, (treaty of 1825,) for any purpose whatsoever, be and are hereby reserved," &c.

That this is the true reading of the proviso is manifest from what is called the "indemnity clause" of the first section. This gives a right to indemnity lands in lieu of lands that may be disposed of between the date of the act and the location of the road, and provides for such indemnity selections in cases where land "*has been* reserved *by* the United States for any purpose whatever." Here it is shown that reserved lands were those reserved *by* as well as *to* the United States.

And here it is shown that the proviso has been operating to reserve lands from the grant between the date of the act and the location of the road.

b. The verbal criticism is bad again because it would leave the proviso without any effect at all. It must apply to the Indian reservations or nothing. This would defeat a cardinal canon of interpretation that

"effect, if possible, must be given to every clause."—(Sedgwick Stat., 2d ed., 200, *n.*)

The "indemnity clause" saved from the grant all homestead and pre-emption settlements made until the road should be located, so that the proviso had nothing to operate on but the Indian reservations.

c. This verbal criticism is bad, because this court has so decided.—(Wolcott *vs.* Des Moines Navigation Co., 5 Wallace, 681; Williams *vs.* Baker, 17 Wallace, 144; Railroad Co. *vs.* Fremont Co., 9 Wallace, 89; Railroad Co. *vs.* Smith, 9 Wallace, 95; 5 Opinions, 578, 10 Stat., 28.)

In Wolcott *vs.* Des Moines Company, (5 Wallace, 681,) the same question arose. The act of 1856 granted lands to the State of Iowa, to aid in the construction of certain railroads, with this same proviso. Prior to this act, Congress had granted lands along the Des Moines river to the State of Iowa, to aid the improvement of the navigation of the river. The Railroad Company claimed lands which were covered by the former grant. The court said:

"This grant to the State, it is admitted, covers the tract within which the lot in question is situated unless excluded by this proviso. The question turns upon the construction of the proviso."

The court then construed the proviso, and held that the land was excluded from the railroad grant by it. But it had not been reserved "to the United States." It had, in fact, been granted *from* the United States to the State of Iowa. The lands were *granted away* "for the purpose of aiding an object of internal improve-

ment," not "*reserved* to the United States" for any purpose.

The proviso reserves from the grant "all lands heretofore reserved to the United States by any act of Congress * * * for the purpose of aiding in any *object of internal improvement*," &c.

This refers to the land granted to Kansas for internal improvements.

Yet these lands were not reserved "to the United States," but to the State of Kansas. They had been granted from the United States. It is not shown that there were any of these lands along this road, but the *proviso* was a settled formula found in many of the railroad land-grant acts.

d. If it were necessary, I would insist that the Osage treaty of 1825 did reserve lands "to the United States"—certainly to the United States for all purposes of the act of 1863.

The treaty declares that these lands "shall be reserved to and for the Great and Little Osage tribes or nations," &c.

And it then declares that—

"Said reservation shall be surveyed and marked at the expense of the United States, and upon which the agent for said tribes or nations and all persons attached to said agency, as also such teachers and instructors as the President may see fit to authorize and permit, shall reside, and shall occupy and cultivate, without interruption or molestation, such lands as may be necessary for them."

Now, here was a reservation "to and for the United States" for the purposes for which all Indian lands are reserved.

The lands were reserved *to* the Indians for their purposes—to the United States for their purposes.

The mere form of words employed can be of no consequence. The real question is, what was done with the lands, and they were reserved for every purpose the United States had in view?

In a larger sense, all Indian lands are reserved to the United States. The Government has the sole pre-emption right—the right to buy—all rights reserved except a perpetual right of occupancy in the Indians.

SECTION 4. *The uniform usage proves that the Osage lands were excepted from the grant.*

The claim of the Railroad Company is, that the grant attached to these lands because, "when the line of road was definitely fixed," they were then public lands—that is, that the treaty, proclaimed January 21, 1867, removed "their Indian title and character" and made them "public lands."

It will be shown hereafter that, under the railroad grants, no lands can pass, but such as were "public lands" at *the date* of the granting acts.

The Railroad Company *would be in a better position to claim a grant if the Osage treaty, proclaimed January 21, 1867, had been made prior to the act of March 3, 1863.*

But even then, it could claim no grant.

This has been decided in a similar case.

The act of September 20, 1850, (9 Stat., 466,) made a railroad grant for Mississippi just as the act of March 3, 1863, made a grant to Kansas, except only that the *proviso* in the act of 1863 is stronger in its reservations than the Mississippi act.

The Chickasaw treaty of May 24, 1834, (7 Stat., 450,) required the Chickasaw lands to be sold for the benefit of the Indians just as the Osage treaty of 1867 required the Osage lands to be sold for the benefit of the Osage Indians.

The Mississippi Railroad Company claimed that the grant attached to these Chickasaw lands just as the Railroad Company now claims that a grant attached in the Osage lands.

The Attorney General in an opinion of August 7, 1852, (1 Lester, 516; 5 Opinions, 603,) said the claim was "not only arbitrary, but in several respects irreconcilable with the intent and plain meaning of the act." Upon this authority, then, the claim of the Railroad Company here must be denied. The company is certainly in no better condition to claim a grant than if the Osage treaty of 1867 had been made *prior* to the act of 1863.

The Chickasaw lands will be more fully referred to hereafter. (See Division III, section 2, 5 Opinions 603.)

I am now considering the claim of a grant as resting only on the act of 1863.

SECTION 5. *This construction of the proviso is confirmed in the "indemnity clause."*

a. The indemnity clause gives lands outside of the ten-mile limits and within twenty miles, in lieu of those sold by pre-emption, &c., out of those "*granted as aforesaid.*" That is, granted by the previous granting clause. The proviso excepted the Osage lands from being "granted as aforesaid." There could be no indemnity, then, in lieu of the Osage lands.

b. Indemnity lands can only be selected "from the public lands of the United States." The proviso excepted all others from the grant. The indemnity clause and the proviso then harmonize in their purpose to apply the grant only to such lands as were public lands at the date of the act.

DIVISION II.

The act of 1863 *made a grant* IN PRÆSENTI *in the lands not excepted from the operation of the act. This was not of a fee subject to the Indian right of occupancy, but of a perfect title. Hence the grant was not intended to include the Osage lands not then owned by the United States.*

SECTION 1. *The language of the grant and the authorities prove the grant was* IN PRÆSENTI.

The first section of the act contains three distinct parts: first, the "enacting" or granting clause; second, the "indemnity clause;" and third, the *provisos.* Each part has its purpose. The object of the first is to make a railroad grant. The language is:

"That *there be, and is hereby,* granted to the State of Kansas for the purpose, &c., * * * of a railroad, &c., * * * every alternate section of land designated by odd numbers for ten sections in width on each side of said road."

This language has been judicially construed.

In the case of Railroad Company *vs.* Smith, (9 Wallace, 95–99,) the Railroad Company claimed title to land under the act of June 10, 1852, (10 Stat., 9,) which makes a grant in the same words of the act of March 3, 1863. Smith claimed under the "swamp-land grant"

of September 28, 1850.—(9 Stat., 519.) This act provides:

"That to enable the State, &c., to construct drains to reclaim swamp lands, the whole of those swamp lands unfit for cultivation shall be and the same are hereby granted to said State."

The swamp lands had not been selected as the statute authorized, up to the time "when the line of the railroad had been definitely fixed."

The question was whether the *proviso* to the railroad act excepted the swamp lands from the railroad grant, or whether the railroad grant attached by the location of the road.

Mr. Justice Miller, in commenting on the words of the "swamp-land grant" act, said:

"Now here is a PRESENT GRANT by Congress, of certain lands to the States within which they lie, but it is by a description which requires something more than a mere reference to their townships, ranges, and sections, to identify them as coming within it. In this respect it is *precisely like the railroad grants* which only become certain by the location of the road."

Here it is distinctly affirmed that both acts make a *present grant*, and are in that respect, as some others, "*precisely alike.*"

Both acts are alike in the granting clause, and the railroad acts are made definite in identifying the lands as by odd sections, while the swamp lands require a selection.

In 11 Opinions, 47, (1 Lester, 549, December 23, 1851,) the effect of the swamp-land grant acts was considered, and the Attorney General said:

"The first question involved in this case is as to the period when the grants take effect, whether it be *the*

date of the law, or the date of *the approval of the selections* by the Secretary; and the general law of 1850 enacts that the fee shall rest in the State upon the issuing of a patent. In each case the granting clause is in the first section, and the words employed, viz: 'are hereby granted,' seem to me to import a grant *in præsenti*. They confer the *right to the land*, though other proceedings were necessary to perfect the title. When the selections are made and approved, or the patent issued, the title therefore becomes perfect, *and has relation back to the date of the grant.* * * * As the grants are regarded as taking effect from *the date of the laws* making them respectively, and as vesting the inchoate title in the States, it follows that any subsequent sale or location of swamp or overflowed lands must be held to be illegal."

This was approved by Secretary Cox, May 24, 1869, (2 Lester, 386.) And see Lessieur *vs.* Price, 12 Howard, 56; Glasgow *vs.* Hortez, 1 Black, 595; Wolcott *vs.* Des Moines Co., 5 Wallace, 681; Allison *vs.* Halfaire, 11 Iowa, 451; Railroad Company *vs.* Fremont County, 9 Wallace, 89; Rice *vs.* Railroad Company, 1 Black, 357; Rutherford *vs.* Green, 2 Wheat., 196; Armstrong *vs.* Morrill, 14 Wallace, 120; Fore *vs.* Williams, 35 Miss., 533.

In 8 Opinions, 257, (December 22, 1856,) the Attorney General said:

"'That there be, and is hereby, granted;' these are indubitably effective terms of grant *in præsenti.*"

This was on the act of August 8, 1846, (9 Stat., 77.)

The opinion of December 19, 1856, (1 Lester, 513,) was on an act like that of March 3, 1863, and the Attorney General said:

"The act by its text makes a conditional grant *in præsenti* in the nature of a *float*, and which does not

attach to any particular parcel of the public lands until the necessary determinative lines shall have been fixed on the face of the earth."

This clearly holds that *the right* to lands vested *at the date of the act*, though other proceedings were necessary to *identify* the lands.

Rutherford *vs.* Greene, Wheaton 196. The North Carolina Statute of 1782 enacts—

"That 25,000 acres of land *shall be* allotted for, and given to Major General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners."

These were commissioners authorized to lay off and allot lands. It was urged that—

"These words indicate an intention to give *in future*, but create no *present interest* in Greene."

But Marshall, C. J., says:

"The court thinks differently. The words are words of absolute donation, not indeed of any specific land, but of 25,000 acres in the territory set apart for officers and soldiers. * * Given when? When they shall be allotted. Given how? Given by force of *this* act. This legislative act it is said cannot amount to a grant. It is clearly and unanimously the opinion of this court *that the act of* 1782 *vested a title* in General Greene, and that the survey made in pursuance of that act gave precession to that titile and attached it to the land surveyed."

In Fore *vs.* Williams, 35 Miss., 533, October, 1858, a part of the syllabus is:

"The issuance of the patent to the State, as provided for by the 2d section of the act of Congress of 28th September, 1850, (9 Stat., 519,) donating swamp and overflowed lands to this and other States is not neces-

sary to the vesting in the State of the legal title to the lands thereby granted. The first section of the act *grants at the date of its passage* to the State all the swamp and overflowed lands lying within its limits, and the legal title to the same *vests then in the State* as fully as if the lands were specifically designated in the act."

This act says:

"The whole of those swamp and overflowed lands made unfit thereby for cultivation which remain unsold, shall be, and the same are hereby granted to said State."

The act required the Secretary of the Interior to make out a list and plats of the land and transmit them to the Governor, and, at the request of the Governor, to cause a patent to issue to the State, and declared that—

"On that patent the fee simple to said lands shall vest in said State."

The swamp-land grant act of March 2, 1849, (9 Stat., 352,) to Louisiana, was in the same words, and requires lists to be made out, and approved by the Secretary of the Interior, on which the fee should vest.

The Secretary, in his letter, December 23, 1851, to the Commissioner of the General Land Office, discusses the question as to whether the grant took effect at "the date of the law or the date of the approval of the selections," and he decided that the words

"are hereby granted," "import a grant *in præsenti. They confer the right to the land*, though other proceedings were necessary to perfect the title. When the selections were made and approved, or the patent issued, the title therefore became perfect, *and has relation back to the grant.*"—(1 Lester, 549, No. 578.)

In Lessieur *vs.* Price, (12 Howard, 75,) the grant is:

"That four entire sections of land be, and the same are hereby, granted to the State of Missouri, &c., for the purpose of fixing the seat of government thereon."

The act provides that the sections shall be located under the direction of the legislature. They were not selected for some time after the grant. The court held it was a *present grant*, and that the title passed to the State at the date of the act; and the selections afterwards made by the legislature, and the notice given to the surveyor general, gave precision to the title and identified the land.

In Allison *vs.* Halfaire, (11 Iowa, 451,) a similar question was decided in the same way.

These authorities correct some expressions in 8 Opinions, 246.—(1 Lester, 515.)

It is perfectly clear, therefore, that the act of March 3, 1863, made a grant *in præsenti.* It created a *vested right* at *its date*, and the subsequent certified location of the road *identified* the lands to which the *previous right* had been given, and the proceedings to *identify relate back* to the *date of the act*, and have effect as if *then* made. The doctrine of "*relation*" is well understood and fully discussed in the books.

This whole claim of a railroad grant, it seems to me, may, on the plainest principles, be disposed of and defeated in a few words.

The act either passed a title at its date or it did not.

If it *did*, then the grant could only be held to attach to those lands which Congress intended, and could intend consistently with treaty obligations, that the Railroad Company might *then* take. Congress could not have so intended as to the Osage lands.

If the act did not pass the title at its date, there is not one word in it, *relating to the subject of a grant*, which looks to a future grant. If, then, a future grant is made, it is made without one word on the subject in any clause relating to a grant.

SECTION 2. *A grant* IN PRÆSENTI *could not be intended to include the Osage lands.*

Having thus ascertained the character of the grant, and the *time* when the *right to* the lands *vested*, we come to inquire whether such a grant was *intended* to be made in the Osage lands.

They were at the date of the law an Indian reservation. By the treaty of 1825 the United States agreed that the Indians should occupy these lands *forever*, if they might so choose. There was then no purpose either on the part of the Indians or the United States to change this condition.

But if the grant took effect in these lands, it only awaited the location of the road to identify them, and set them apart to the Railroad Company.

The Railroad Company had a right to make this location in a year, or a month, or a day, if that were possible.

Before this act can be held to make a grant, the Court must believe that Congress intended that these lands might be set apart in one month to the Railroad Company, and thus to utterly disregard the obligations of the treaty of 1825.

This would be a degree of perfidy, and bad faith, that a court will not attribute to Congress, and to avoid it, must hold that the act intended to make no such grant.

This Government has never yet attempted to sell out the Indian title before acquiring it, nor violate treaties by attempting to do so.

SECTION 3. *The act of* 1863 *did not grant the Osage lands, because the Government did not then own them.*

If an attempt had been made to grant a title without having one, nothing would pass by it.

Secretary Browning, in his opinion of 1867, (*ante*, page 38,) says:

"Some authorities affirm that when a grantor has at the time of the grant no estate in the thing granted, a subsequently acquired title will not pass by force of the grant if there be no covenant or warrantee annexed thereto."

If it were necessary, and this rule had any application to this subject, I would insist upon it. This is the law in a proper case.—(1 Ld. Raynn, 729; 12 Johns., 201; 13 Johns., 316; 4 Bibb, 436; Bond *vs.* Swearinger, 1 Ohio, 402; Allen *vs.* Parish, 3 Ohio, 116; Herman's Law of Estoppel, 256–294.) The acts of 1863 and 1866 contain no covenant. The Government would not be estopped if they did.—(Herman on Estoppel, 256–295.)

In Rice *vs.* Railroad Co., (1 Black, 358,) a part of the syllabus is:

"Legislative grants are not warrantees, and the rule of the common law must be applied to them, that no estate passes to the grantee *except what was in the grantor at the time.*"

And it was said by Mr. Justice Clifford:

"The rule universally applied in determining the effect of legislative grants is, that if the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee."

See also Polks, lessee, *vs.* Wendell, 9 Cranch, 99; Same case, 5 Wheaton, 303; Patterson *vs.* Winn, 11 Wheaton, 388.

The act of 1863, then, could not grant *the perpetual Indian title* or *right of occupancy*, and Congress manifestly did not intend to grant a naked fee which might not be enjoyed for a century, if ever, and leave a perpetual right of occupancy to remain in the Indians or be sold by their treaty *to others*.

Wherever the grant could take effect, it was of an absolute title, for there is nothing in the act to show a purpose to grant any less, and Congress could not have intended to pass such title without owning it.

SECTION 4. *There is no grant of a fee subject to the Indian right of occupancy.*

It cannot be said that the act of 1863 grants the fee of the lands, and that the Railroad Company takes it *cum onere*—that it is a grant subject to the Indian right of occupancy, and therefore no violation of the treaty. This is certain for many reasons.

a. The act grants a right of way through the reserved lands "subject to the approval of the President." This approval was required, so that the President might, as he did in the treaty proclaimed January 21, 1867, secure it before it could be enjoyed.—(Article 11.) Now, if the act of 1863 had been designed to secure any other rights in the Osage reservation, it would have so provided. The provision as to right of way shows that no other right was to pass to the Railroad Company.

It is incredible that the United States would not give a simple right of way through these lands except on

condition that the President should approve it, so as to secure it by treaty, and yet would grant away nearly the whole of the lands without making any provision for a treaty or other approval of the grant.

b. And if a grant *cum onere* had been intended, the act would have so declared. It is not such a grant, because it does not say so.

The act of 1866 does make a grant of lands in the Indian Territory, contingent on two conditions, (1,) that "the Indian title shall be extinguished," and, (2,) "provided that said lands become a part of the public lands of the United States."—(See p. 31, *ante*, sec. 9.)

And see act July 2, 1864, (13 Stat., 365.)

But the act of 1863 employs no such language as this, and hence was not designed to make any grant *cum onere*, or contingent.

Where a grant is made in general terms, and there are public lands to which it can apply, it is never held to include the fee of lands subject to the Indian right of occupancy, except when in the granting act, or its manifest object, there is something to show such purpose, as in cessions by treaty from one nation to another, and other like cases.—(Jackson *vs.* Potter, 1 Paine, 472.)

Even then the law of nations protects rights of property, including the Indian right of occupancy.—(United States *vs.* Percheman, 7 Peters, 51; 8 Stat., 258; 8 Stat., 202; 9 Stat., 930.)

SECTION 5. *The usage under all railroad land-grant acts proves that they do not grant the fee subject to the Indian right of occupancy, or in any form at any time.*

There is great value in the common understanding and opinions uniformly entertained by those who administer laws and all interested through a long series of years. It is expressed in this maxim: "*Contemporanea expositio est fortissima in lege.*"—(Sedgwick, 213; Dwarris, 562; 53 Pa. St., 61.)

The system of land grants in aid of railroads commenced more than twenty-five years ago, and is found in a series of acts nearly all in the same form.

The language employed in the act of 1863 is by no means new.

Bounty-land grants were made to States and Territories by—

Act September 20, 1850, to Illinois, 1 Lester Land Laws, 161.

Act June 10, 1852, to Missouri, 1 Lester, 183.

Act February 9, 1853, Arkansas, &c., 1 Lester, 196.

Act June 29, 1854, Minnesota, 1 Lester, 226–238.

Act May 15, 1856, Iowa, 1 Lester, 258.

Act May 17, 1856, Florida, &c., 1 Lester, 259.

Act June 3, 1856, Alabama, 1 Lester, 261–282.

Act June 3, 1856, Louisiana, 1 Lester, 263.

Act June 3, 1856, Wisconsin, 1 Lester, 264.

Act June 3, 1856, Michigan, 1 Lester, 265.

Act August 11, 1856, Mississippi, 1 Lester, 269.

And various other similar acts since are found in the 2d vol. of Lester, including the Kansas acts now under consideration.

There were *Indian reservations* along the lines of many of these grants.

I will present to the court a list of 160 Indian reservations, which only embraces a part of those in our history.

Prior to 1865, there were grants in the same form as the act of March 3, 1863, with Indian and other reservations existing at the date of the granting acts along the lines of roads or improvements, as follow:

States and Territories.	No. of roads, &c., for which grants made.	No. of reservations along them.
Michigan	4	4
Wisconsin	4	7
Minnesota	3	4
Nebraska	2	2
Kansas	6	22
Nevada	1	2
Montana and Washington	1	9
Oregon	1	1
	22	51

Here are grants for 22 roads with 51 reservations, existing at the dates of the granting acts, covering millions of acres of land.

A letter from the Commissioner of the General Land Office, dated September 15, 1874, says:

"Many of these reservations have been extinguished by treaty or special legislation directing the disposal of the lands in a particular manner, and in such cases *they have not been considered as inuring to the grant, no matter at what date the disposal has been made.*"

Here, then, millions of acres, situated precisely as the Osage ceded lands, have been sold.

"They have not," says the Commissioner of the General Land Office, "been considered as inuring to the grant, *no matter at what date the disposal has been made*"—whether *before* or *after* the "*lines of roads were definitely fixed.*"

In all the years from 1850 *to* 1875 *no Railroad Company ever claimed any of the Indian reservations along the lines of these roads or that under any circumstances a grant could attach to them*, except only in the one case of these Osage lands so effectually repudiated by Congress in the joint resolution of April 10, 1869. This claim was originally sustained by Secretary Browning only by reason of the "Senate amendment," and not by force of the act of 1863. It was always perfectly well understood that none of the Indian reservations ever inured to the grants, "*no matter at what* date the disposal was made."

Yet if the fee passed by the land-grant acts, or a right to the fee, *present* or *prospective*, then it would be violated by a subsequent treaty sale. The treaty sale would in fact be void.

If, now, all this understanding of the law, which has prevailed for twenty-five years, is reversed, it will destroy titles to millions of acres of lands sold by treaties and laws both before and after the "lines of roads were definitely fixed."

Cities, towns, and whole countries, densely populated, in many States and Territories, and for long years held by titles never before questioned, will be handed over to Railroad Companies.

It would destroy the titles vested in the Chickasaw lands under the opinion of the Attorney General of August 7, 1852, (5 Opinions, 603.) It would give this Railroad Company a claim to all the Ottawa lands on the line of this road not sold prior to its location, and destroy the titles made under the treaty of 1862, (see page 15, *ante*.)

In no one case has any land included in a reservation been given to any Railroad Company.

An attempt has been made to claim two insignificant exceptions, made without consulting any law officer of the Government, and since the controversy as to these Osage lands commenced, but they make no exception.

By patents of July 7 and November 4, 1873, there were granted to the Northern Pacific Railroad Company $64{,}496\frac{69}{100}$ acres of land in what had been the Gull Lake reservation in Minnesota.

The reservation was ceded to the United States absolutely, as their *public lands*, by treaty of May 7, 1864, (13 Stat., 693,) with no condition to sell for the benefit of the Indians. The Northern Pacific Railroad grant was by act of July 2, 1864, (13 Stat., 365,) so that *at the date of the land*-grant act, *there was no reservation.*

The treaty, it is true, was not proclaimed until March 20, 1865; but treaties, unless otherwise provided therein, take effect *as of their date*, and the ratification and proclamation *relate back* to that.—(Davis *vs.* Parish, &c., 9 Howard, 280.)

And, besides this, the act of July 2, 1864, is peculiar and different from the act of March 3, 1863.

In the other of these cases the Commissioner of the General Land Office, by letters of January 15 and March 31, 1874, awarded to the Grand Rapids and Indiana Railroad Company a small tract of $2{,}848\frac{57}{100}$ acres, which had been withdrawn for Indian purposes by the President's order of May 14, 1855.

But this was in a case where the order "was qualified" and peculiar. The Commissioner, in a letter of January 23, 1875, says:

"You will doubtless perceive that this was not, in its technical sense, an Indian reservation, and was, therefore, treated *exceptionally* in disposing of the railroad grant."

But no number of erroneous decisions, if made by the Interior Department *since* the ruling on these Osage lands, and while the subject is in the courts, can make valid any error as to these.

SECTION 6. *The "indemnity clause" proves the grant was* IN PRÆSENTI.

It gives lands to the Railroad Company outside of the ten-mile limit in lieu of those sold by pre-emption, &c., out of those "granted as *aforesaid*."

There were, then, no lands granted but those "granted as aforesaid." The indemnity clause made no grant.

The lands "granted as aforesaid" were granted before any location of the road. *The location had no effect on the grant*—for all the lands were granted *as aforesaid.*

The *grant* was then *in præsenti*—the right was vested *in præsenti*, and without reference to the time of the location of the road.

DIVISION III.

The general terms of the grant in the act of 1863, *independently of its* PROVISO *exception, were not designed to apply to any lands but those which were "public lands" at its date, and hence the Osage lands, not then being "public lands," did not fall within the grant.*

SECTION 1. *The act of* 1863 *shows a general purpose, by its own language, to deal only with "public lands" in making a grant. It names* THESE *as subject to the grant, and, by necessary implication, excludes all others.*

a. It will not be denied that the act of 1863 does deal with the "public lands" and makes a grant in them.

There is an immense grant of such lands, originally designed to extend from Lawrence to the north line of the Osage reservation through the counties of Douglass, Franklin, Anderson, and Allen, under which the company has received $102{,}268\frac{73}{100}$ acres.

But while dealing with the *public lands*, this act was not designed to deal with *reserved lands*, because, by uniform usage, by law, and many treaties, there was *an established policy* which *devoted them to Indian occupancy* so long as the Indians chose to maintain it, and then to sale for their benefit when they so desired.

This was so well understood that in the argument filed on behalf of the Leavenworth, Lawrence, and Galveston Railroad Company, in the contest with the Missouri, Kansas, and Texas Railroad Company in the Interior Department, in February, 1870, these lands are referred to as "lands which were *not grantable* at the date of the law" of 1863. (See No. XXII of Chronological Statement.)

b. The "indemnity" clause of section one shows that none but "public lands" fell within the grant.

It is as follows:

"*But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purpose aforesaid, from the* PUBLIC LANDS *of the United States near-*

est to tiers of sections above specified, so much land, in alternate sections or parts of sections, *designated by odd numbers*, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of pre-emption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers and selected by the direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for *the use and purpose aforesaid: Provided*, That the land to be so selected shall, in no case, be located further than twenty miles from the lines of said road and branches: *Provided further*, That the lands hereby granted for and on account of said road and branches severally, shall be *exclusively applied in the construction of the same*, and for *no other purpose whatever*, and shall be *disposed of* only as the work progresses *through the same*, as in this act hereinafter provided."

Here it will be seen indemnity selections could only be made of "THE PUBLIC LANDS of THE UNITED STATES."

The lands granted must be of the *same kind*, because the indemnity lands were between the ten and twenty-mile limits, and were therefore necessarily of the same kind—all "public lands," lands "nearest to tiers of sections *above specified*."

They were lands *in which there could be homestead* settlements and pre-emption entries. None but "public lands" are subject to such settlement or entry. The pre-emption act of September 4, 1841, (5 Stat., 455, sec. 10,) expressly excepts "lands included in any reservation by any treaty," just as does the *proviso* to the act of 1863.

The lands intended to be granted could only be such as Congress then knew might be granted, and might *then* be granted. The State could accept the grant,

and a Railroad Company could locate a road without any delay. This would identify the land to pass by the grant. In a month from the date of the act of March 3, 1863, the Secretary of the Interior might be called on to select the indemnity lands. The lands granted then were such, and such *only*, as could lawfully be sold, or made the subject of homestead settlement or pre-emption entry.

There is not one word in the law which requires delay, or says the Railroad Company shall acquire new or enlarged rights thereby.

c. The lands granted were such as "shall be *disposed of* as the work progresses *through* the same."

The State was authorized to sell absolutely the lands. If the grant could attach to these lands, it could do so in a month. It is incredible to believe that Congress, in the act of 1863, agreed to grant the Osage lands; for, if so, they might be sold by the State in a month, and thus utterly disregard the Indian title, and the obligations of the treaty of 1825.

d. The lands granted were only such as Congress intended to agree that a railroad might be made through in a month. But Congress could not have intended any such thing as to the Osage lands.

This would violate the Indian rights and the treaty of 1825.

Congress refused to grant a right of way without the "assent of the President," so that it might be secured by treaty.

Congress could not have intended to give a right to sell the lands. By the act of June 30, 1834, (4th Stat.,

730, sec. 11,) it was made a crime to *survey* or *settle* on this reservation, and that law is yet in force. If a railroad grant was made by the act of 1863 the Government thereby agreed to *survey* the lands for the Railroad Company, and to permit sales of them, and thus violate not only the treaty of 1825, but other laws. This is inconsistent and impossible.

SECTION 2. *The Osage lands were excluded from the granting clause in the act of* 1863 *by* PRIOR *treaties, statutes, and the general policy of the Government.*

a. By the Osage treaty of 1825, these lands were expressly "*reserved* to and for the Great and Little Osage tribes or nations aforesaid, *so long as they may choose to occupy the same.*"—(7 Stat., 240.)

This was by the Constitution a *law*—"the supreme law of the land."—(Const., art. 6.)

By this supreme law, these lands were devoted to the use of the Indians forever. At the time the act of 1863 was passed, no effort had been made, and none was anticipated, to terminate this perpetual right.

Even in the absence of treaty stipulation, the Indian right of occupancy is perpetual. The latest utterance of this court on this subject is in United States *vs.* Cook, (19 Wallace, 591–3,) where it is said that the ultimate fee of Indian lands is in the United States, and that the Indians have no power of alienation except to the United States; but the court say:

"The right of the Indians to their occupancy is as sacred as that of the United States to the fee. * * This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion."

And in Cherokee Nation *vs.* Georgia, (5 Peters, 1,) it is said:

"The Indians are acknowledged to have the unquestionable and heretofore unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to the Government."

The Osage lands, then, were reserved from grant under the act of 1863, by the treaty of 1825.

b. They were equally reserved by the policy of other laws not repealed by the act of 1863.

The act of June 30, 1834, "to regulate trade and intercourse with the Indian tribes," &c., (4 Stat., 729, sec. 11,) declares—

"That if any person shall make a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or shall survey, or shall attempt to survey, such lands, or designate any of the boundaries by marking trees, or otherwise, such offender shall forfeit and pay the sum of $1,000. And it shall moreover be lawful for the President of the United States to take such measures and to employ such military force as he may judge necessary to remove from the lands, as aforesaid, any such person, as aforesaid."

It would be impossible to carry the act of 1863 into effect in the Osage lands without violating this law. The act of 1863 required surveys, sales, settlements. This would make it a stipulation for crime.

c. They were reserved by a policy not first inaugurated, but sanctioned by act of 1837.

The act of January 9, 1837, (5 Stat., 135,) sanctified a policy of selling *all* lands which might be ceded by

Indians, and of investing the money for their benefit. It provides:

"SECTION 1. That all moneys received from the sales of lands that have been or may be hereafter ceded to the United States by Indian tribes, by treaties providing for the investment or payment to the Indians, parties thereto of the proceeds of the lands ceded by them respectively, after deducting the expenses of survey and sale, any sums stipulated to be advanced, and the expenses of fulfilling any engagements contained therein shall be paid into the Treasury of the United States in the same manner that moneys received from the sales of public lands are paid into the Treasury.
* * * * * *

"SEC. 3. That all investments of stock that are or may be required by said treaties, shall be made under the direction of the President; and special accounts of the funds under said treaties shall be kept at the Treasury, and statements thereof be annually laid before Congress."

The policy of this act was so well understood that Congress refused to change it even in favor of the much favored pre-emption system.

The pre-emption act of September 4, 1841, (5 Stat., 456, sec. 10,) preserved the policy of the act of 1837.

It declares that—

"No lands included in any reservation by any treaty, law, or proclamation of the President; *no Indian reservation to which the title* has been or *may be extinguished* by the United States at any time during the operation of this act * * * shall be liable to entry under * * * this act."

The Osage lands were reserved from any grant in the act of 1863, by the policy of this act of 1837.

d. The policy of this act of Congress has been uniformly carried out in our Indian treaties.

Railroads passed through reservations, but the Railroad Companies, until now, never claimed that the acts making grants of land to them in the same form as in the acts of 1863, ever gave them any claim on the Indian lands.

I will cite some of the principal treaties relating to Indian reservations in Kansas, and these will show that the claim now made by the Railroad Company is condemned in all of them. They show an unbroken line of policy.

Before commencing with these I will go back of them to show that the policy of selling the lands for the benefit of the Indians, and of excluding therefrom any railroad grant, antedates the land-grant system, was coeval with it, and has continued ever since.

The "Railroad Land-Grant System" commenced with the act of September 20, 1850, for the benefit of the Illinois Central and other railroads, (1 Lester, 160; 9 Stat., 466.) This act gave the *formula* since generally adopted for all railroad grants. The proviso to it declared—

"That any and all lands reserved to the United States by the act (of March 2, 1827, granting lands to Illinois to aid in opening a canal, &c.,) be, and the same are hereby reserved to the United States from the operation of this act."

It did not, as the act of 1863 does, use words to specifically except from grant Indian reservations, or lands ceded by Indians to the United States to be sold.

Under this act a railroad was made passing through that portion of the State of Mississippi which embraces the Chickasaw Indian "ceded lands."

The Railroad Company claimed the alternate odd sections under the act of September 20, 1850.

By the Chickasaw treaty of May 24, 1834, (7 Stat., 450,) after giving specific tracts of land to certain persons, it was provided that—

"The residue of the Chickasaw country shall be sold as public lands of the United States are sold, with this difference," &c. "The funds thence resulting (after paying expenses) shall from time to time be invested in some secure stocks, * * * and the United States will cause the interest arising therefrom annually to be paid to the Chickasaws."—(Article XI.)

The lands were to be sold at a price not less than $1 25 an acre first at public sale, and then at private entry for one year, and after that at private entry at one dollar an acre, &c.

The Attorney General, in an opinion August 7, 1852, (1 Lester, 516; 5 Opinions, 603,) said:

"The Indians had but the right of occupancy; the ultimate right was in the United States with the pre-emptive and sole right to purchase the Indian title. *By the treaty* [of May 24, 1834] *the right of possession, and the actual possession, and the ultimate right and title to the lands became united and vested in the United States.* By the treaty the Government * * * is bound to sell * * * those lands and apply the proceeds to the use and benefit of the Chickasaws. * * *

"No part of these sections within what was called the Chickasaw Country (as defined by the treaty of 1834) can be held by the State of Mississippi, under the grant of 20th September, 1850. * * * The constructions that would alone support that claim seem to me to be not only arbitrary, but in several respects *irreconcilable with the intent and plain meaning of the act.*"

In that case the act of 1850, like the act of 1863, required the alternate reserved even-numbered sections to be sold for not less "than the double minimum price of the public lands."

The fund to arise from the sale might not in that case be reduced by admitting the Railroad Company's claim.

In that case the Attorney held, that although the perfect title was vested in the United States, *yet Congress did not intend the grant to extend to Indian lands.*

And this settled the policy and purpose of like land-grant acts in future. If the act of 1863 is now held to make a grant in the Osage lands, the act of 1850 must be held to make a grant in the Chickasaw country, and the titles acquired under the opinion of the Attorney General will be destroyed.

It would be an unnecessary labor to trace all the grants, and all the Indian reservations.

It will be sufficient to present some of the principal Kansas reservations to show how this policy has been carried out.

The following are presented:

I. *Delaware reserve*—Treaty of May 30, 1860, art. 3, (Vol. Treaties, 347,) sells, at an appraisement, to the Leavenworth, Pawnee, and Western Railroad Company; the money to be held by the President "for the benefit and improvement of the Delaware people."—(P. 343, sec. 8, treaty 6th May, 1854.) This would be subject to the act of January 9, 1837, (5 Stat., 135.)

II. *Pottawatomie reserve*—Treaty February 27, 1867, art. 2, (Vol. Treaties, 691.)

This authorizes the Atchison, Topeka, and Santa Fé Railroad Company to purchase the land. The purchase money is to be paid to the Secretary of the Interior. This would be subject to the act of 1837.

This carried out the previous policy of the treaty of November 15, 1860, (Vol. Treaties, 686,) sec. 5, which

authorized the Leavenworth, Pawnee, and Western Railroad Company, whose *road passed through the reserve*, to purchase the lands at $1 25 an acre, to be paid "to the Secretary of the Interior in trust for said Indians."

This would be subject to the act of 1837.

III. *Kickapoo reserve*—Treaty June 28, 1862, art. 5, (Vol. Treaties, 450,) authorizes sale to the Atchison and Pike's Peak Railroad Company.

The purchase money to be paid to the Secretary of the Interior, "in the securities of the United States, in trust for said Kickapoo tribe."

This falls within the act of 1837.

IV. *Kansas or Kaw reserve*—Treaty October 5, 1859, art. 4, (12 Stat., 1111,) provides for sale of lands of the Indians; "the proceeds thereof to be expended for their benefit, in such manner as the Secretary of the Interior may deem proper."

This falls within the act of 1837.

V. *Ottawa reserve*—Treaty June 24, 1862, art. 9, (12 Stat., 1240.) This reserve was on the line of the Leavenworth, Lawrence, and Galveston Railroad. It requires a sale of the lands "and all the moneys derived from the sales shall be paid at the time and place when the Secretary of the Interior may direct."

This falls within the act of 1837.

The lands were not all sold at the date of the act of March 3, 1863.

VI. *Cherokee neutral lands*—Cherokee treaty, July 19, 1866, cedes lands to the United States, to be sold.—

(Art. 17.) By art. 23 all funds "shall be invested in the United States registered stocks," &c. This falls within the act of 1837. Under this, nearly two counties, Cherokee and Crawford, and parts of others, were sold to James F. Joy for the Missouri River, Fort Scott, and Gulf Railroad Company.—(Joy *vs.* Holden, 17 Wallace, 211.)

VII. *Ottoe reserve*—Treaty, March 15, 1854, cedes land to the United States, for money to be paid.

VIII. *Delaware reserve*—Treaty, July 4, 1866, authorizes the Secretary of the Interior to sell to the Missouri River Railroad Company, and proceeds to be invested, &c.—(14 Stat., 794, arts. 2–6.)

This falls within the act of 1837.

IX. By treaty, February 23, 1867, numerous tribes sell, &c.—(Vol. Treaties, 839.)

X. *Osage reservation*—Osage treaty, September 29, 1865, (14 Stat., 687.)

Article 1 cedes to the United States the lands now in controversy, called the "Osage ceded lands," and provides that—

"Said lands shall be surveyed and sold under the direction of the Secretary of the Interior on the most advantageous terms, for cash, *as public lands are surveyed and sold* under existing laws, including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands."

It will be observed, the treaty in effect says these are *not* "public lands," but are to be "surveyed and sold" "*as* public lands are surveyed and sold."

Here, then, is provision for the sale of these lands substantially in the same form as in all other treaties.

And the joint resolution of April 10, 1869, (16 Stat., 55,) only carries out this purpose.

There are several reasons for holding that the opinion of the Attorney General in the case of the Chickasaw Mississippi ceded lands, should apply with greater force to the Osage ceded lands.

1. The fund arising from the sale of the Chickasaw lands might not be reduced by admitting the railroad grant.

To admit the grant in the Osage lands would, for the two railroad companies for lands "*in place*" and as "indemnity," take by far the largest part of the Osage lands and leave nothing to go to the "civilization fund," as required by the treaty.

2. The United States held an absolute title in the Chickasaw ceded lands at the date of the railroad grant, and it contained no express reservation of Indian land.

In the case of the Osage ceded lands the United States did not, at the date of the act of 1863, have a full title, if any, and there was in that act an express reservation from the grant of all Indian lands.

3. The Chickasaw treaty was made before the act of January 9, 1837, (5 Stat., 135,) had added the legislative sanction to the policy of selling *all Indian lands* for the benefit of the Indians.

The Osage treaty was made in view of that act, and was not designed to disregard or *repeal it.*

XI. On the 27th May, 1868, President Johnson made a treaty with the Osages for the sale of the diminished

reserve, 8,003,203 acres, to the Leavenworth, Lawrence, and Galveston Railroad Company, at 19 cents an acre; but early in the year 1870, President Grant, to his everlasting honor be it said, withdrew *this, and all Indian treaties which attempted to sell public lands*, from the Senate, and thus prevented so palpable a sacrifice. (House Ex. Doc. 179, 2d Sess. 41st Cong.; Letter Sec. War, May 3, 1870; Globe, Pt. V, 2d Sess. 41st Cong., 4159, 4135; Clark's speech, House, January 13, 1869; Globe, Vol 2, 2d Sess. 41st Cong., p. 1579.) And this policy was endorsed by Congress, March 1, 1871, by a clause in a conference committee report put on the Indian appropriation act of March 3, 1871, *prohibiting all such treaties*. But Congress has since by law carried out the former policy treaty.

XII. The act of Congress of July 15, 1870, (16 Stat., 362, sec. 12,) provides:

"That whenever the Great and Little Osage Indians shall agree thereto, in such manner as the President shall prescribe, it shall be the duty of the President to remove said Indians from the State of Kansas to lands provided, or to be provided, for them, for a permanent home in the Indian Territory, to consist of a tract of land, in a compact form, equal in quantity to one hundred and sixty acres for each member of said tribe, or such part thereof as said Indians may desire, to be paid for out of the proceeds of the sales of their lands in the State of Kansas, the price per acre of such lands to be procured in the Indian Territory not to exceed the price paid, or to be paid, by the United States for the same. And to defray the expenses of said removal, and to aid in the subsistence of the said Indians during the first year, there is hereby appropriated out of the Treasury, out of any money not otherwise appropriated, to be expended under the direction of the Secretary of the Interior, the sum of fifty thousand dollars, to be

reimbursed to the United States from the proceeds of *the sale of the lands of the said Indians in Kansas, including the trust lands north of their present diminished reservation; which lands shall be open to settlement after survey*, excepting the sixteenth and thirty-sixth sections, which shall be reserved to the State of Kansas for school purposes, *and shall be sold to actual settlers only*, said settlers being heads of families or over twenty-one years of age, in quantities not exceeding one hundred and sixty acres, in square form, to each settler, at the price of one dollar and twenty-five cents per acre; payment to be made in cash within one year from date of settlement or of the passage of this act. And the United States, in consideration of the relinquishment by said Indians of their lands in Kansas, shall pay, annually, interest on the amount of money as proceeds of sale of said lands, at the rate of five per centum, to be expended by the President for the benefit of said Indians, in such manner as he may deem proper. And for this purpose an accurate account shall be kept by the Secretary of the Interior of the money received as proceeds of sale, and the aggregate amount received prior to the first day of November, of each year, shall be the amount upon which the payment of interest shall be based. The proceeds of sale of said lands shall be carried to the credit of said Indians on the books of the Treasury, and shall bear interest at the rate of five per cent. per annum: *Provided*, That the diminished reserve of said Indians in Kansas shall be surveyed, under the direction of the Secretary of the Interior, as other public lands are surveyed, as soon as the consent of said Indians is obtained, as above provided; the expense of said survey to be paid from the proceeds of sale of said land."

This applies to the "Osage trust lands" and the "Osage diminished reservation."—(Wood *vs.* Missouri, Kansas, and Texas Railroad Company, 11 Kansas, 347.)

This carries out the policy of the act of 1837.

The "ten-mile limits," and the wider *indemnity* limits of the railroad grants, if they shall extend through the Osage reservation, will take for both the Leavenworth, Lawrence, and Galveston Railroad, and for the Missouri, Kansas, and Texas Railroad, not only a large part of the ceded lands, but some of the Osage trust lands and Osage diminished reserve lands. And *if a grant can be deduced from the act of* 1863, it applies equally to the ceded, trust, and diminished reserves. They are all alike in the purposes of the act.

And if the act makes a grant, or at least a right *in præsenti* as it does, in whatever lands it can cover, it gives a vested right, which no subsequent treaty or even statute could take away.

The question now to be decided, then, involves a grant in all these lands, and asks the court to annihilate the titles which Congress intended to make by the act of July 15, 1870.

And *if the act of* 1863 *is held to make a grant of the fee in the Osage lands, then all the grants for railroads passing through numerous other Indian reservations equally granted the fee.* But they have, nevertheless, been sold under treaty authority to hundreds of thousands of settlers, and all their titles will be destroyed, and millions of acres be swept from them and surrendered to Railroad companies whose officers never intimated the existence of any such right.

e. The treaty of 1825 indicates that the Government never designed to assert any claim in these lands for its own benefit, or that of the people, except the right of navigating the rivers.

The first article "cedes and relinquishes to the United States" certain lands.

The second article *reserves* to the Indians these lands. And to show *what rights* the United States retained, it is provided as follows:

"And the United States also hereby reserve to themselves forever the right of navigating freely all watercourses and navigable streams within and running through the tract of country above reserved to said tribe or nation."

This was all that was retained by the United States. *Expressio unius exclusio alterius.*

And Congress has given its sanction to all this, and thus, by the only power competent to dispose of the fee of the lands, has devoted the Osage reservations to purposes other than a railroad land grant.

f. Congress has regarded the Osage Indians as having the *absolute* ownership in their reservations, at least so far as to require them to be sold for their benefit. The act of July 15, 1870, (16 Stat., 362, sec. 12,) refers to them as "the lands of the said Indians;" and the joint resolution of April 10, 1869, (16 Stat., 55,) refers to them as "the lands sold to the United States by virtue of" the treaty, &c.

Here, then, these lands were set apart as Indian lands forever, and as not falling within the scope of any grant:

I. By the usage with all Indian tribes and treaties, the opinion of the Attorney General, and the determination of the Supreme Court, hereafter stated.—(Wilcox *vs.* Jackson, 13 Peters, 498.)

II. By the treaty of 1825, ratified by repeated acts of Congress.

III. By the act of 1834, which made it a crime to survey or otherwise go on them.

IV. By the act of 1837, which contained a pledge to sell all Indian lands for the benefit of the Indians.

V. By the pre-emption act of September 4, 1841.

It was in view of all these that the act of 1863 was passed, and its purpose is limited by them.

And the legislation of 1869 and 1870 more than confirms this.

The act of 1837 declared the policy and purpose of Congress whenever the Indians should cede the lands to the United States.

If the act of 1863 made a grant of these lands at all, it must be admitted, as said by Mr. Justice Miller, (Record, p. 79,) that

"No provision whatever is made in the act for the protection of Indian rights, nor even for delay in enforcing the title thus passed to the defendants."

They are either *reserved forever* from the operation of that act, or not reserved at all.

And if this act does not reserve the lands forever, then Congress is made by it to violate treaty obligations, to outrage all sense of justice, and to *repeal pro tanto*, and by the never-favored "*implication*," the act of 1834, the purpose of the act of 1837, and the treaty of 1825.

As a question of legislative intent, then, it is by all justice and every reason against the grant, especially when we consider the rule of construction which holds that "if there be any doubt, it is to be resolved as conclusive against the grant."

g. But it may be urged that this wrong can be avoided by holding that the grant did not attach until the Indian title was extinguished.

It is a sufficient reply to this to say, as will be shown hereafter, that the grant was *in præsenti*, and could attach to no lands reserved for any purpose at its date—and that the *proviso reservation* applied to the *then* reserved lands.

There is clearly nothing in the act of 1863 to postpone the time "when the line or route of said road" shall be "definitely fixed." And the utmost that the defendant has claimed or can claim is, that, when the line of road is fixed, its rights in the already-granted lands attach.

h. The authorities make it clear that the history of legislation in reference to any subject-matter of general interest may be referred to to aid in the construction of a statute.—(Sedgwick, 2d ed., 214; Henry *vs.* Tilson, 17 Vermont, 479.)

And the decisions of this court show that where Congress has, by its legislation, adopted a general policy, this forms a basis for declaring what the law is.—(Planters' Bank *vs.* Union Bank, 16 Wallace, 483; Joy *vs.* Holden, 17 Wallace, 211.)

SECTION 3. *Congress did not intend, by the act of* 1863, *to make a grant in the Osage lands, because this would have compelled the Government to negotiate with the Indians to extinguish their title, not at its own convenience, but when the Railroad Company required, and it would have taken from the Government the usual means of doing so.*

1. The usage of the Government in our numerous Indian treaties, has been to provide for a sale of the Indian lands, and, *with the proceeds*, purchase for the

Indians a new home, and invest the residue in Government bonds, and with the interest thereon pay them annuities, and thus support them.

In order to do this, it has been found necessary to make grants of select lots of land to Indians who chose to adopt the habits of white men, to men who had rendered services to the Indians, to religious societies or missions located among them, for schools, &c. The treaties are full of provisions of this character. As a matter of *plain truth*, it was necessary *to enlist the influence* of leading men and missions to induce the Indians to surrender their reservations and recede before the advancing tide of civilized life. Now, if the act of 1863 made a grant in these lands, this whole policy, pursued in all other cases, would have been defeated.

It is incredible to believe that Congress, by the act of 1863, intended to surrender the means adopted generally in treaties for securing a cession of the Indian title.

The United States were then engaged in a great war, a national debt was rapidly running up, it was feared the Government might fail for want of means to suppress the rebellion, money could not be borrowed in Europe except to a limited extent, and yet we are asked to believe that Congress, by the act of 1863, assumed a liability to extinguish the Indian title to the Osage lands, and surrendered the ordinary means of doing so, and all this by mere implication, in the face of a long-established policy and against all usage.

We are asked to believe that Congress did for this Railroad Company what has never been done even in favor of our highly-favored homestead and pre-emption

system—surrender the privilege of donating, by treaty, sections of land for missions, schools, and persons meriting the gratitude and reward of the Indians.

2. When the treaty was ratified by the Senate in 1866, by many of the men who aided in passing the act of 1863, a different view was taken of this act.

a. The treaty gives a section of land for a Catholic mission, a section to Schœnmaker, a Catholic priest, for schools; gives lands to several persons designated; and gives to all loyal persons, heads of families, having made settlements, the right to buy a quarter section each. It was then understood that no grant had been made, or this means of securing the adoption of the treaty would have been cut off.

And among the sections given by the treaty, and those settled on, there must have been *odd-numbered* sections. And if there had been a grant by the act of 1863, these had been disposed of when the treaty was made.

If the act of 1863 is now held to be a grant, all these titles under the treaty will fail.

It is no answer to this to say that the act of 1863 only operated on such lands as the United States had when the line of road was fixed.

To say the act of 1863 is a grant of the fee unless the lands are otherwise disposed of by the treaty, is to say what the act does not. This is to call it a grant when it is *per se* no grant.

For if the grant rests *solely* on the act of 1863, it must operate as a grant of the *fee* in *every* odd section, and give a right of possession, without regard to

Indian occupancy, when the line of road was definitely fixed, or when so fixed, *and* the Indian title extinguished. And there could not in any event be any treaty sale of *any odd section.*

But the act was not so understood in 1866.

b. The treaty requires that "said lands shall be surveyed and sold * * * for cash as public lands are surveyed and sold," &c.

They could not be so sold if there had been a grant by the acts of 1863 and 1866, for the two Railroad Companies, for lands granted *in place*, and as *indemnity* land would have taken nearly all of the lands.

SECTION 4. *But it is settled on authority that the act of 1863 cannot as a question of legislative intent be construed to apply to the Osage reservation.*

On this subject I will present some cases.

Wilcox *vs.* Jackson, 13 Peters, 498:

The facts were these:

In October, 1824, land was, by direction of the Secretary of War, ordered to be reserved from sale as a *military reservation*, in what is now the city of Chicago. In 1835, one Beaubean made a pre-emption entry of the land, and sold to Jackson. Wilcox was in possession as an officer of the United States under the Secretary of War. Jackson brought ejectment. The court say, the first question is, whether "Beaubean acquired any title. The claim is under the act of June 19, 1834, to revive the pre-emption act of May 29, 1830."

This act excepts from the right of pre-emption lands—

"Which shall have been reserved for the use of the United States, * * * or by order of the President, or which may have been appropriated for any purpose whatsoever."

It was urged "that by the 4th section of the act of June 26, 1834," the President was authorized to cause lands in Illinois to be sold, including this land. The court held that this act did not so authorize, and then say—

"But we go further, and say that whenever a tract of land shall have once been legally appropriated to *any purpose*, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent *law* or *proclamation* or *sale* would be construed to embrace or to operate upon it, although no reservations were made of it."

This principle applies to Indian reservations.

An Indian reservation is more obviously outside of the scope and intent of these grants than a military reservation, for the reason that the former are set apart and used for a purpose wholly inconsistent with such grants.

Spalding *vs.* Martin, 11 Wisconsin, 262:

In 1835 the President, by authority of law, reserved a tract of land in Wisconsin for a military reservation.

On the 8th of August, 1846, Congress passed an act granting lands to Wisconsin to aid in the improvement of the Fox and Wisconsin rivers, "equal to one-half of three sections in width on each side of Fox river." The grant, which was general, and contained no exception in its terms, included the lands covered by the military reservation.

It was subsequently abandoned as a military reservation, and sold in 1854, under the act of March 3, 1819, to defendant, Martin.

Spalding acquired the right of the State, and brought ejectment to recover the land.

On the argument for the plaintiff, counsel cited Veeder *vs* Guppy, 3 Wiscon., 502; 8 Opinions, 256, Dec. 22, 1856; and might have added 9 Opinions, 386.

The court say:

"The title to this section was in the United States at the time of the grant; it was within the general limits of the grant. It undoubtedly passed to the State, unless the fact that it was at the time a military reservation, occupied as such by the United States, prevented that effect. And we think it did. * * *

"Congress did not intend, under the general terms of this law, to divest the United States of title to those specific portions within the limits of the grant *which had been previously set apart for public use*, and were in actual occupation by the Government for military purposes.

"This conclusion seems irresistible from the general policy pursued by the Government in disposing of its lands, and the difference between the purposes for which it holds the general body of these lands, and those for which it holds such as it actually occupies for some public purpose.

"The original title to the vast body of wild lands, * * * subject to such rights as are recognized in the Indian tribes, is in the United States. * * * It has caused them to be surveyed, has disposed of them to individuals, * * * and has *frequently granted large tracts to aid in various public improvements.* This has been the purpose for which the Government holds these lands.

"And the phrase, 'public lands,' has a well-known signification *limited to these only.* But the Government has need of specific portions of lands for military or

other purposes. It *has provided by law for the* reservation of such tracts. They are known as 'reservations,' and there is significance in the word. Reserved from what? Obviously *reserved from disposition in the manner and for the purposes* for which the general body of the public lands are disposed of."

The court then go on to cite the case of State *vs.* Delesdenier, (7 Texas, 76,) and say:

"It is an authority to the same effect. The Islands had there been reserved from sale by law. Subsequently there was further legislation in respect to the public lands, and with a repealing clause as follows: 'And all laws heretofore enacted on the subject of public lands shall be, and they are hereby, repealed.'"

A party located scrip * * * on an island and obtained a patent. The court conceded the law reserving the islands to be within the language of the repeal, but held it was not the intent to repeal it, and that this clause *was to be limited by the* general scope and object of the subsequent legislation, where it was found, which obviously did not extend to a change of the public policy with respect to the islands.

The doctrine of these cases was so well understood that in August, 1852, when the President asked the opinion of the Attorney General on the effect of a bill passed by Congress making a grant of the right of way for roads, &c., through the public lands, he said it would not affect reservations.

The following is the opinion of August 4, 1852:

"I have carefully examined 'An act to grant the right of way to all rail and plank roads, macadamized turnpikes passing through the public lands belonging to the United States,' and which, having passed both houses of Congress, is now before you for your consideration and approval.

"You desire my opinion whether the provisions of that bill will extend to lands which 'have been purchased by the United States for light-houses, barracks, hospitals, arsenals, armories, navy-yards, and other like purposes.'

"All the grants made by the bill are expressly confined to the 'public lands' of the United States, and that designation would not include either land which the United States had purchased, or land which they had reserved or appropriated out of the public domain, for any of the purposes indicated in your letter, *or for any purpose whatever.* Lands, so purchased or reserved, are in law and in fact *severed from the public domain, and no subsequent law or warrant authorizing the appropriation of 'public lands' would be construed to embrace lands which the United States held by such purchase or reservation.* So it was, in effect, decided by the Supreme Court of the United States in the case of Wilcox *vs.* Jackson, (13 Peters, p. 498.)

"Such would be the result, *independently of the proviso at the end of the 3d section of the bill, and that proviso tends, I think, to the same conclusion.* It is quite imperfect in its expression, but *the true meaning and construction of it I take to be this,* that the grantees are not to have any rights in any lands of the United States, other than (in) such as (having been surveyed) are held for private entry and sale, or in such unsurveyed lands of the United States as are not held for public use, by erection or improvement thereon.

"According to this construction, the proviso itself would afford protection to all lands purchased, reserved, or held for public use, by erection or improvement thereon.

"I think, therefore, that no apprehension need be entertained that the rights granted by this bill can interfere in any way with the lands purchased by the United States for any of the purposes mentioned in your letter."—(5 Opinions, 578.)

This opinion was given to the President before he approved the bill which became the act of August 4,

1852, (10 Stat., 28.) And see Stoddard *vs.* Chambers, 2 Howard, 248; Vincennes University *vs.* Indiana, 14 Howard, 268; Easton *vs.* Salisbury, 21 Howard, 426; 2 Opinions, 186.

There have been cited in opposition to these views, 8 Opinions, 255; 9 Opinions, 346; 1 Lester, 505; Jackson *ex dem* Sparkman *vs.* Porter, 1 Paine, 458–472.

None of these could overrule the weight of reason and authority in the cases cited, but they do not necessarily conflict, since they all turn upon a question of legislative intent.

The case in 8 Opinions, 255–8, was on a statute totally unlike the act of 1863.

Attorney General Cushing said—

"Here is not a grant of land along arbitrary lines like those of *unlocated railroads;* nor a grant at large in a whole State, but a grant within limits geographically determined by the act."

In October, 1832, an Indian treaty provided that "two townships of land on the east side of Winnebago lake * * * shall be laid off for the use of the Stockbridge and Munsee tribes."—(7 Stat., 405, 342, 580.) This was in a treaty between the United States and the Menomee nation.

The act of August 8, 1846, (9 Stat., 83,) granted to Wisconsin, "on the admission of such State into the Union," land equal to half of three sections on each side of Fox river, and made *no reservation* of Indian or other lands.

Within these limits were the lands "laid off for the use of the Stockbridges."

The State was admitted into the Union by acts of March 3, 1847, and May 29, 1848.—(1 Lester, 128–135.)

These acts seem to confirm the previous grant.

By the treaty of 1856, the Stockbridge Indians made an absolute sale to the United States.—(11 Stat., 663; 9 Stat., 955.)

Attorney General Black, on June 3, 1859, decided that the State took these lands.—(9 Opinions, 346; 1 Lester, 505.)

But here was no proviso exception, as in the act of 1863, no grant which might take effect at once and without delay, and it seems to have been confirmed after the grant by a reference which might include the fee of the Indian lands.

The case of Jackson *ex dem* Sparkman *vs.* Potter (1 Paine, 457–472) only treats of the nature of the Indian title, and the *power of Congress* to dispose of the fee, but *construes no law* making any grant of lands. In that case, Sparkman claimed under a deed from an Indian tribe. The court held the Indians could only grant to the Government but not to individuals, and proceed to say:

"The European nations, by whose subjects the discoveries were made, respected the rights of the natives as occupants, but asserted the ultimate dominion to be in themselves; and, as a necessary consequence thereof, claimed and exercised the power of granting the soil while yet in the possession of the Indians.

"And SUCH grants have been universally understood to convey a title to the grantees, subject only to the Indian right of occupancy. The United States have adopted and acted upon the same principles. By the Revolution, the power of government and right of soil which had been previously in Great Britain, passed definitively to these States. And it has never been doubted but either the United States or the several States had a clear title to all the lands within the boundary lines described in the treaty of peace, sub-

ject only to the Indian right of occupancy; and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it. And the practical assertion of this right is seen in the policy which has governed the United States and the individual States, in prohibiting all purchases of the Indians by individuals in their own right.

"And the Indians, being mere occupants, are deemed incapable of transferring an absolute title to others. This occupancy is not incompatible with a seisin in fee in the State. A purchaser from the natives, at all events, could acquire only the Indian title, and must hold under them, and according to their laws. The grant must derive its efficacy from their will, and if they choose to resume it and make a different disposition of it, courts cannot protect the right before granted. The purchaser incorporates himself with the Indians, and the purchase is to be considered in the same light as if the grant had been made to an Indian, and might be resumed by the tribe, and granted over again at their pleasure.

"If this be the view which we are to take of the Indian right of occupancy, the claim of John Stedman, considered in the most favorable manner, could never have been anything more than a mere right of possession, subject to be reclaimed and extinguished at the will of the Indians, and which has been done, as will be seen hereafter."

SECTION 5. *General rules of construction require the act of* 1863 *to be construed as making no grant of the Osage lands.*

This view of the act of 1863 is required by two well-known rules of construction. These are—

1. That "statutes *in pari materia* are to be taken together as if they were one law," in order to ascertain the sense of each.—(Sedgwick, Stat., 210, 2d ed.)

2. That "repeals by implication are not favored—a general statute, without *negative* words, will not repeal the particular provisions of a former one, unless the two acts are *irreconcilably inconsistent.*"—(Sedgwick, 98.)

Now, with these rules before us, their application is not difficult.

Here are the treaty of 1825, the act of 1834, the act of 1837, the act of 1863, the opinion of the Attorney General, the ruling of the Supreme Court, the usage of all treaties. These were all laws, or had assumed the effect of existing laws. They are *in pari materia*, because, as Sedgwick says, (p. 211,) they are "general laws made at different times and in reference to the same subject." No one contains any *negative* on any other, and hence there is no *express* repeal. They are not "irreconcilably inconsistent," because *effect can be given to each* without defeating any other, and there is therefore no repeal by implication.

Hence, all must be construed together, so that even the *policy* or *purpose* of any one shall not be interfered with by any other. This cannot be done if the act of 1863 makes a grant of these lands. For if it does, it is a repeal of the treaty of 1825. It is a repeal *pro tanto* of the act of 1834 to protect Indian occupancy and prevent intrusions on their lands. It is a defeat of the policy of the act of 1837 which contemplates the sale for the benefit of Indians of all lands by them ceded to the Government. It is an interruption of that policy of Christian civilization from which so much is hoped, and for which so many millions have been expended. It is a repeal of the opinions of the Attorney General and the decisions of the court already cited.

SECTION 6. The omission of any provision in the act to determine how the lands should be divided between the two railroad companies is evidence that no land grant was intended in these lands.

This subject is sufficiently discussed hereafter in Part III, Division I, Section 5, to which reference is made.

SECTION 7. *The purpose of Congress not to make any grant of the Osage lands, by the act of* 1863, *is shown by reference to other laws.*

This is shown both in our Indian treaty provisions, and by other acts of Congress.

1. Many of these treaties and acts have already been cited, and it is unnecessary here to repeat them.

2. Wherever Congress intended that a present grant should be operative, in an Indian reservation in any contingency, express provision has been made accordingly.

This may be seen by reference to the act of July 26, 1866, (14 Stat., 289, Section 9, this brief, p. 31.)

This act makes a grant for a railroad, now the Missouri, Kansas, and Texas Railroad, from Fort Riley south, "with a view to an extension of the same through a portion of the Indian Territory, to Fort Smith, Arkansas."

The Indian Territory was covered with the Indian title.

Here Congress *did intend* to make a grant, on certain conditions, of the Government fee. But this was not left, as in the act of 1863, to a general grant. But it expressly provided as follows:

"SEC. 9. That the same grants of lands through the said Indian Territory are hereby made as provided in

the first section of this act, *whenever the Indian title shall be extinguished by treaty or otherwise*, not to exceed the ratio per mile granted in the first section of this act: *Provided, That said lands became a part of the public lands of the United States.*"

Here are two conditions annexed to a grant of the fee:

1. That the Indian title shall be extinguished.
2. That the lands shall become "public lands."

The first preserves treaty obligations and good faith; the second preserves equally good faith by maintaining the policy of the act of 1837, (5 Stat., 135.) It also shows that, if taken by the United States to sell and invest proceeds under a treaty and the act of 1837, the lands would not thereby become "public lands."

The absence of any such provision in the act of 1863 is full of evidence against the grant claimed under it.

The act of 1866, having thus legislated on the subject of the Indian lands *south of Kansas*, also gave a right of way through the Indian Territory, in the following words:

"SEC. 8. That said Pacific Railroad Company, southern branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas rivers, to Fort Smith, in the State of Arkansas; and the right of way through said Indian Territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary grounds for stations, buildings, workshops, machine-shops, switches, side-tracks, turn-tables, and water stations."

Here, then, *the whole subject of the Indian Territory was disposed of.*

But Congress did not stop with this. In the act of 1866 it is further provided as follows:

"SEC. 10. That said Pacific Railroad Company, southern branch, its successors and assigns, shall have the right to negotiate with, and acquire title to, land for railroad purposes from any Indian nation or tribe authorized by the United States to dispose of lands, *and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the President of the United States*, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States."

This could not relate to the Indian Territory, for that had already been disposed of. This section was doubtless inserted to enable the Railroad company to buy these lands if the pending treaty should not be agreed to. It was well understood that the lands could not in any event become "public lands," and that the Railroad companies could not claim a grant therein.

The Pacific Railroad Company, now the Missouri, Kansas, and Texas, was, by the original purpose of the bill, authorized to negotiate for and purchase these lands of the Osage Indians. The road passed *through* them. The Congress of 1866 intended to give this company the *same right* to acquire these lands that other Railroad companies had enjoyed by treaty of acquiring other Indian lands, if the pending treaty failed.

This provision shows some important facts:

1. The Congress of 1866 did not believe that the act of 1863 made any grant to the Leavenworth, Lawrence, and Galveston Railroad Company in these lands,

or no such provision would have been made in favor of the Missouri, Kansas, and Texas Railroad Company, not even when the line of road should be definitely fixed.

It clearly was not intended to authorize a purchase if a grant had already been made, or could by any contingency take effect.

2. That Congress did not suppose that the Osage treaty either *made* or *recognized* any grant to the Leavenworth, Lawrence, and Galveston Railroad Company, or to any company, for the "Senate amendment" to that treaty had been agreed to a month before the act of 1866 became a law.

This will have an important bearing on the subject of the treaty, which will be hereafter considered.

3. In advance of the railroad grants in Kansas, Congress had declared the proper understanding of the subject.

The act of January 29, 1861, for the admission of Kansas into the Union, (12 Stat., 126,) declared the State of Kansas one of the United States of America, and that it should consist of all the territory within defined boundaries.

These boundaries included Indian reservations. Congress intended these to belong to the State jurisdiction *when the Indian title should be extinguished by treaty*, and a *proviso* clearly declared this purpose by saying:

"*Provided*, That nothing contained in said constitution [of the State] * * * shall be construed to impair the rights of person or property now pertaining to the Indians * * * *so long as such rights shall remain unextinguished by treaty*," &c.

Here was a grant of such part of sovereignty as a State can have over land—a land grant—clear and unequivocal after the Indian title should be extinguished.

But when Congress subsequently made the railroad land grant in the act of March 3, 1863, the *proviso* reserved the Osage reservation *then and forever*, without any words limiting the reservation, only "so long as such [Indian] rights shall remain unextinguished by treaty."—(And see act July 2, 1864, 13 Stat., 367, sec. 2.)

4. The act of March 3, 1863, (12 Stat., 772,) and the Osage treaty proclaimed January 21, 1867, (14 Stat., 689,) show that no rights in the Osage reservation were to pass to railroad companies, *after the Indian title should be extinguished*, but those specifically named.

The proviso to the act of 1863 reserved all Indian reservations "from the operation of the act." The treaty was not a repeal of the proviso. It does not so declare. Repeals by implication are not favored. The proviso and the treaty may both stand. The proviso continued after the treaty to reserve the Osage reservation from the operation of the act in making a grant.

Division IV.

The "indemnity clause" of the act of 1863 *does not make a future grant of lands "reserved" from grant at its date.*

The claim of the Railroad Company is, that, by delaying the location of the road, lands became subject to a grant which were not so when Congress passed the granting act. In other words, it is claimed that a

grant was made contingent on the extinguishment of the Indian title, and that it was extinguished by the treaty.

This claim is based on the "indemnity clause" of the statute, and is a concession that without the extinguishment of the Indian title, so as to make the Osage lands "public lands," no grant was made or can take effect.

We deny that a contingent grant was made, and deny that the contingency has happened, and I proceed to show some of the reasons therefor.

SECTION 1. *The improbability of this claim.*

It is extremely improbable that Congress would offer a premium for delay in making a railroad. The act of 1863 required the road to be completed within ten years.

It does not in any direct terms indicate that the grant may be enlarged by delay, or upon any contingency. By the rule of construction, then, that a doubt defeats the claim, it must fail, for no one can say that it is clear that Congress intended to enlarge the grant by delay, or on any future contingency.

There is no promise to buy out the Indian title for the benefit of a railroad company. No such thing was contemplated.

Yet the court is asked to believe that Congress contemplated that delay should enlarge the grant without having contemplated any thing looking towards putting the lands in condition for a grant.

SECTION 2. *The* PURPOSE *of the "indemnity clause" shows no enlargement of the grant was intended by delay.*

The first section of the act of 1863 is divided into three essential parts:

1. The "enacting" or granting clause;
2. The "indemnity clause;" and,
3. The *provisos*, or excepting clauses.

Each of these performs a distinct office.

The object of the first is to make a grant of "public lands."

The third clause or clauses perform a double function:

1. The *unnecessary*, but common and proper office of avoiding controversy, by giving notice of what the law already implied, that lands otherwise appropriated should not pass by the granting clause; and

2. It performed the really *effective office* of declaring that "the right of way only should be granted, subject to the approval of the President," in the reserved lands. That is, it can at most only have this effect, if the provision for right of way can apply to *all* the *reserved* lands, including the Osage lands. It is probable this clause, as to right of way, should be construed as only giving a right of way through the reserved lands that might be taken by pre-emption settlement or homestead entries.

The "indemnity clause" intervened, between the grant and the provisos, as follows:

"*But in case it shall appear that the United States* HAVE, *when the lines or routes of said road and branches are definitely fixed,* SOLD *any section or any part thereof,* GRANTED AS AFORESAID, *or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever*, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the

purpose aforesaid, FROM THE PUBLIC LANDS OF THE UNITED STATES nearest to tiers of sections above specified, so much land, in alternate sections or parts of section, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of pre-emption or homestead settlements *have attached* as aforesaid; which lands, thus indicated by odd numbers and selected by the direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid: *Provided*, That the land to be so selected shall, in no case, be located further than twenty miles from the lines of said road and branches: *Provided further*, That the lands hereby granted for and on account of said road and branches severally, shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided."

Now, to understand the purpose of this, it is proper to refer to other existing laws.

The act of July 22, 1854, (10 Stat., 310, sec. 12,) and the act of March 10, 1854, (10 Stat., 269,) made all "public lands" subject to pre-emption under the act of September 4, 1841, (5 Stat., 455, sec. 10.) The homestead act, May 20, 1862, (12 Stat., 392, sec. 1,) subjected the "public lands" also to homestead entries.

It would seem from the letter of the Secretary of the Interior to the Commissioner of the General Land Office of August 29, 1854, (1 Lester, 520, 354,) that at an early day in the land-grant system the practice was to withdraw lands from market in advance of the making of grants, and afterwards immediately on being made.

But as railroad companies generally had ten years to build their roads this would greatly retard the settlement of the country.

Subsequently, and generally, the practice was, as it now is, and has been for many years, to withdraw the lands from market only when the lines of roads were definitely fixed.

Time would often elapse *between the date of a grant* and the certified location of a road, and in the *meantime* "the right of pre-emption or homestead settlements" would attach to the lands "granted as AFORESAID;" and the lands might otherwise be disposed of, or might previously have been reserved for some purpose, and in all such cases Congress, by the "indemnity clause," intended to provide that indemnity lands, in lieu of those so disposed of, might be selected between the ten and twenty-mile limits.

Attorney General Cushing, on the 19th December, 1856, (8 Opinions, 246; 1 Lester, 513,) said of a similar act:

"It contemplates that the United States shall retain power to convey within all the possible limits of the grant either by ordinary sale or on pre-emption up to the time 'when the lines or routes of said roads are definitely fixed,' and provides for the case by granting, contingently, substituted lands beyond the original limits."

This proceeds upon the idea that the beneficiary *Railroad Company has a right to all the odd sections within the grant at the* DATE OF THE ACT, or an equivalent in indemnity lands. The equivalent is given for the loss of lands after the right accrued at the date of the act. For *if no right attached* until the location of the road then there could exist no claim for indemnity.

The *indemnity* is for a *lost right*, and *if no right exists until the location of the road none could be previously lost.*

The real purpose of the "indemnity clause," then, was—

1. To give lands outside of the ten-mile limits as indemnity for those lost inside by pre-emption sales, &c., between the date of the granting act and the location of the road.

2. To determine *the time when* homestead entries and pre-emption settlements should cease, and the selection of indemnity lands should be made. These pass by selection; the lands granted in place pass by the grant without selection.

Having thus ascertained *a clear and undisputed purpose for this clause*, it ought not to be *strained* to have *another effect* by no means clear, but very far-fetched—to subject to the grant the Osage lands to which it could not attach at the date of the act.

"He must have optics sharp, I ween,
Who sees what is not to be seen."

SECTION 3. *The indemnity clause* MAKES NO GRANT, *and hence no enlargement of the prior grant by delay.*

The effect of the act may be ascertained by supposing the indemnity clause to be omitted. It will then read (omitting immaterial parts) as follows:

"That there be, and is hereby, granted to the State of Kansas, for the purpose of aiding in the construction of a railroad from the city of Leavenworth, by way of the town of Lawrence, to the southern line of the State in the direction of Galveston Bay, in Texas, *every alternate section of land, designated by odd numbers, for ten sections in width on each side of said road: Provided, That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose* of aiding in any object of internal improvement, *or for any other purpose*

whatsoever, be, and the same *are hereby reserved to the United States from the operation of this act*, except," &c.

Now, upon these words, with the proviso exception, as well as for other reasons, *these Osage lands would not be covered by any grant at any time.* There could be no *future operation* given to *these words* that would extend a grant to the Osage lands, no matter how much or how the Indian title might be extinguished.

What, then, was the object of the "indemnity clause?" Why was it inserted?

It certainly was not to make any *new grant* within the ten-mile limits not already made. It does not say a word to show any such purpose.

Its purpose was *not* to make any grant, either *original* or *contingent*, within the ten-mile limits.

Its purpose *was* to give indemnity lands *outside of the ten-mile limits*, for lands within, to which a right attached *at the date of the law* by force of the granting clause of the act, but which, before the line of road was fixed, had been lost by pre-emption settlements, &c.

This gives effect to every part of the section and makes all a consistent, harmonious whole. Here is no mystery—no doubt. When an attempt is made to construe the indemnity clause into a *future and contingent grant*, not merely the region of doubt is encountered, but the region of absurdity.

SECTION 4. *The words of the "indemnity clause" show it is no* NEW GRANT *of after-acquired lands.*

By it Congress says to the Railroad Company, in effect:

"We give you alternate odd sections within ten miles on each side of your road, except in the Osage lands.

If, between the date of this grant and the time you locate your road, any of these lands, 'GRANTED AS AFORESAID,' '*have been*' sold by pre-emption, &c., then we give you outside of the ten-mile limits an equal number of odd sections of the same sort of lands—'the public lands of the United States.'"

It will be seen by the express words of this clause it gives indemnity lands in lieu of those "GRANTED AS AFORESAID," and lost by pre-emption sales, &c.

The expression "*granted as aforesaid*" refers to the previous *granting clause*, and makes it clear that it *rests upon its own operative force*, and derives no aid from the indemnity clause, and is not enlarged by it.

By the express terms of this clause, no right can attach to lands by the location of the road, except in such lands as have been "granted as *aforesaid*"—granted by the previous granting clause—and not granted *by* or *in consequence of* the location of the road, nor contingent on the *then* condition of the lands.

And no right can attach by the location of the road, except in such lands, "granted as aforesaid," as were *previously* subject to pre-emption settlement and homestead entry. For this clause only gives indemnity lands for such as could have been, previous to the location of the road, subjected to pre-emption or homestead settlement.

Now, suppose this road had been located on the very day the Osage treaty, proclaimed January 21, 1867, took effect. In such case there could have been no previous pre-emption or homestead settlements. These lands, then, were not such as fell within the grant.

And the treaty says, "no pre-emption claim or homestead settlement shall be recognized" in these lands.

They were, then, not such lands as a grant could take effect in, for the granted lands were only of that class of public lands in which there might be pre-emption and homestead settlements prior to the location of the road.

SECTION 5. *The usage under other statutes shows that the extinction of the Osage title could not extend the grant to the Osage reservation.*

The pre-emption act of September 4, 1841, (5 Stat., 453, sec. 10,) gave the right to make pre-emption settlements and sales. It contains exceptions (substantially in effect like the proviso to the act of March 3, 1863) which exclude certain lands from pre-emption. It says:

"No lands included in any reservation by any treaty, law, or proclamation of the President of the United States, or reserved for salines, or for other purposes; no lands reserved for the support of schools, nor the lands acquired by either of the two last treaties with the Miami tribe of Indians in the State of Indiana, or which may be acquired of the Wyandott tribe of Indians in the State of Ohio, or other Indian reservation to which the title has been or may be extinguished by the United States at any time during the operation of this act; no sections of land reserved to the United States alternate to other sections granted to any of the States for the construction of any canal, railroad, or other public improvement; no sections or fractions of sections included within the limits of any incorporated town; no portions of the public lands which have been selected as the site for a city or town; no parcel or lot of land actually settled and occupied for the purposes of trade, and not agriculture; and no lands on which are situated any known salines or mines, shall be liable to entry under and by virtue of the provisions of this act."

Now it has never been supposed that if any of these excepted lands should lose the specified character, they would *ipso facto* become subject to pre-emption.

As to them the principle has been applied *once excepted, always excepted*, according to the ruling in Wilcox *vs.* Jackson, 13 Peters, 498; Spalding *vs.* Martin, 11 Wisconsin, 262.

If lands *ceased* to be "included in any reservation" they did not *ipso facto* fall within the *grant* of the right to pre-empt.

On the contrary, they could only be made so by law. And hence it was that when Kansas, Nebraska, and New Mexico were about to be opened up to settlement, Congress by act of July 22, 1854, (10 Stat., 310, sec. 12,) expressly provided "that all lands to which the Indian title *has been* or *shall be* extinguished within said Territories of Nebraska and Kansas shall be subject to the operations of the Pre-emption Act of fourth September, 1841," &c.

The uniform ruling of the Interior Department has been that where pre-emption entries exist at the date of a railroad grant, and afterwards become forfeited for non-payment, &c., they *continue excepted from the grant* forever after. They do not fall within the grant. They revert to the public domain as a part of it.

I might cite other laws in confirmation of this.

Let us see what will be the effect of the railroad claim here:

The Osage lands were excepted as an Indian reservation from the railroad grant in the act of 1863, by the proviso thereto. The Railroad Company claims that when they cease to be an Indian reservation then the grant attaches.

If, then, the school lands in Kansas, by arrangement with Congress, should cease to be such they would equally pass by the grant.

All military reservations, when changed into public lands, would become subject to railroad grants. If, by arrangement between Congress and the State of Kansas, the State should surrender her land grants for internal improvements, and accept others, the railroad grants would attach in the lands so surrendered.

Congress has thought otherwise, and passed numerous laws for the sale of military reserves.

The Osage trust lands would pass by the grant, as well as the ceded lands. (See this brief, Part III, Division I, Section 4.)

The Ottowa reserve would pass by the grant so far as the lands had not been sold when the line of road was located.

The sites of forts, light-houses, custom-houses, post offices, (to use the language of the proviso in the act of 1863,) "heretofore reserved to the United States by any act of Congress, or by competent authority for any purpose whatsoever," may cease to be reserved for any of said purposes, and if so, according to the railroad claims, would become subject to the railroad grants within the limits of which so many of them lie.

Here again, titles of untold value would be disturbed, if the railroad claim be sustained.

All this shows the necessity of adhering to the doctrine of Wilcox *vs.* Jackson, 13 Peters, 498; Spalding *vs.* Martin, 11 Wisconsin, 262; 5 Opinions, 578.

SECTION 6. *The* PROVISO *to the act of* 1863 *would except the Osage lands from any words of the "indemnity*

clause" or any other operations of the act which are claimed to extend the grant to after-acquired lands.

If by any construction of the words of the "indemnity clause" standing alone, or in connection with the prior granting clause, they might be so applied to the Osage lands as to make a grant therein whenever the Indian title might be extinguished and they became "public lands," yet all this would be subject to and limited by the *proviso*, and it would except them from such a grant.

By the proviso the Osage lands are "reserved *from the operation of this act.*"

They are *reserved* from *every operation* of the act. Whatever operation, then, the indemnity clause could have, if it stood alone, or in connection with the prior grant, these lands are excepted from. There is nothing to limit or qualify the proviso. It is broad, clear, unambiguous, and sweeping, limited to no time, past or future.

The indemnity clause did not extend the prior grant; nor did it engraft any limitation on the subsequent proviso. On the contrary, the PROVISO limited both the granting clause and, if necessary, any construction of the indemnity clause in favor of a grant by any operation in future. *If the proviso could only take effect when the road was located, and if the grant only then took effect, the proviso would be wholly unnecessary, for there would then, on this theory, be nothing to except.*

All prior homestead and pre-emption claims would be safe if the grant only then took effect. The indemnity clause itself saved them. Unless the proviso operated then *at its date*, and saved the Osage reservation

perpetually from the grant, it could not operate at all. No court can so construe the act as that the proviso shall have no effect.

But this question is settled. In all the cases construing the proviso the court has treated it as operating at its date. These cases have already been cited.

SECTION 6. The proviso continued operative on the Osage lands after the treaty.

The treaty did not repeal the proviso. Repeals by implication are not favored. There is no clear nor any repugnancy between the proviso and the treaty. Both can consistently stand. They may operate in harmony as existing laws. The proviso, then, continues to except from every "operation of the act" all these Osage lands.

The treaty of 1825 reserved the lands.

The treaty proclaimed January 21, 1867, *continued the reservation*, and directed another disposition of the lands for the benefit of the Indians. It was a reservation within the meaning of the proviso.

A *reservation* is something reserved or devoted to a particular purpose.

If lands are devoted to sale "under existing laws," they are reserved from a railroad grant.

SECTION 7. *A conditional grant to take effect upon the happening of a contingency is never made, unless such purpose is clearly expressed. It is not so expressed in the act of* 1863, *and the alleged grant fails.*

The claim of the Railroad Company is, that, as to the Osage lands, the act of 1863 intended to make a condi-

tional grant, only operative on the happening of two contingencies:

1. That the Indian title should be extinguished.

2. That the Railroad Company would delay the location of the road until the contingency should happen.

It has already been shown that when any such contingent grant was intended, the purpose has been expressed in clear terms, as in the act of July 26, 1866, &c.—(14 Stat., 289, sec. 9; this brief, p. 31; act January 29, 1861, 12 Stat., 126; act July 2, 1864, 13 Stat., 367, sec. 2.)

The subject of contingent grants is fully discussed in the books, and these show that where such are intended to be made, they are made in a form to clearly show the purpose.

There is certainly no such purpose shown in the act of 1863.

SECTION 8. *The Osage lands never became "public lands." The Indian title was not extinguished. Hence the "indemnity clause" could not extend the grant to them.*

A. It has already been shown that lands conveyed by Indian treaty to the United States to sell for their benefit are not "public lands."—(This brief, Part II, Division I.)

B. But the Osage treaty, proclaimed January 21, 1867, does not leave this in doubt. It cedes these lands to the United States, and then declares that—

"Said lands shall be surveyed and sold * * * *as public lands are surveyed and sold* under existing laws."

The effect of this is to say that they are *not* "public lands," but that they shall be sold in the same manner as if they were such lands.

Judge Thatcher, in his argument before the Secretary of the Interior, did not quite venture to say that, by the treaty, the lands became in fact "public lands," or that the Indian title was in fact and in equity extinguished. He only says—

"These Osage ceded lands had lost their Indian title and character. * * * From thenceforth they are *treated* as public lands by the Government," (p. 9, 10.)

Even in this he is mistaken.

c. *The Indian title was not extinguished, and hence no grant could attach to these lands.*

The first article of the treaty (omitting unnecessary words) reads as follows:

"ART. 1. The Osage Indians, greatly impoverished, and desirous of improving their condition by disposing of their surplus lands, do hereby grant and sell to the United States the land contained within the following boundaries, (described, &c.) And in consideration of the grant and sale to them of the above-described lands, the United States AGREE to pay the sum of three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians in the Treasury of the United States, and interest thereon at the rate of five per cent. per annum shall be paid annually in money, clothing, provisions, or such articles of utility as the Secretary of the Interior may from time to time direct. *Said lands shall be surveyed and sold under the directions of the Secretary of the Interior on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws; but no pre-emption or homestead settlement shall be recognized, and after reimbursing the United States the cost of said survey and sale and the said sum of* $300,000 *placed to the credit of*

said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States, to the credit of the civilization fund, to be used under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the United States."

The inquiry now is, did this extinguish the Indian title? Did it put the lands in *the condition* of *those lands* to which Congress intended the grant should attach?

That it did no such thing, is settled upon *authority*, and *reason*, the basis of all authority.

a. The Railroad Company can claim no grant in these lands, unless it could do so if the treaty had been made prior to the act of 1863. Now, in *precisely such case as that*, it was decided, in less than two years after the railroad land-grant system commenced, that a grant would not attach in lands so situated.

The act of September 20, 1850, made a railroad grant in Mississippi similar to the act of 1863, through lands ceded by the Chickasaw Indians to the United States to be sold for their benefit, substantially as the Osage treaty requires these lands to be sold for the benefit of the Osage Indians.

Attorney General Crittenden, (5 Opinions, 603; 1 Lester, 516,) on the 7th August, 1852, said that the claim of a railroad grant in these lands was "arbitrary," and could not be sustained.

Other authorities already cited, hold the same doctrine.—(This brief, Part II, Division III, Sections 2 and 4.)

b. The United States, by the treaty, took the perpetual Indian title which was *theirs*, and blended it

with the fee of the United States, and *agreed* to sell all for the benefit of the Indians. This was done with a view to having the proceeds invested under the authority of the act of January 9, 1837, or in substantial analogy thereto.—(5 Stat., 135.)

Here, then, the Indian title merely passed to the United States *in trust* for a defined purpose—to execute the trust by selling the lands. It was a means of making a full title to purchasers, for without this treaty the United States, at most, could only sell a reversionary right, but no perfect, unencumbered title.

This court has declared that—

"The right of the Indians to their occupancy is as sacred as that of the United States to the fee."—(U. S. *vs.* Cook, 19 Wallace, 593.)

Until the act of June 30, 1834, (4 Stat., 729, sec. 12.) the Indians could, perhaps, grant *their* title and again resume it at pleasure.—(Jackson *vs.* Potter, 1 Paine, 457.)

Now, where such a title as this is granted by the Indians, under a *contract* to sell for their benefit, their title is not extinguished.

It is only changed *in character* from a *legal estate* to an *equitable title*; and the Indians who formerly held *in their own right* have simply changed, and occupy the position of a *cestui que trust.*

In Rice *vs.* Railroad Company, 1 Black, 358–381, it is shown that where a grant is made of lands merely to hold and dispose of for the benefit of others, the original title is not extinguished, and nothing passes, as the court say:

"But a mere naked trust, or power to dispose of the

lands, in the manner therein specified, and to apply the same to the use and purpose therein described."

Here, in this treaty, are all the elements of a trust.

The United States *agreed*, not merely that the perpetual Indian title, but that "*the land*" was thereby granted and sold to the United States, *not as the property of the United States*, but to *be surveyed and sold* in the same manner as public lands.

The Government is after this estopped to say anything less than that the whole title was to be sold for the benefit of the Indians. The lands did not become *the property of the United States absolutely*, but only *in trust*. If the title was absolute, the United States might withhold the lands from sale forever. They might convert them into a public park, or reserve them as a public common. They might lease them for profit or for the benefit of schools. They might donate them for any purpose within the purview of Government. But this could not be done under the treaty.

Titles are *legal* or *equitable*. So long as either remains it cannot be said the title is extinguished.

The Indians had this *equitable title* after and under the treaty, and it would continue until the execution of the trust to sell.

The United States did not have a full title, because they could not dispose of the lands except by sale. They dare not, in law or good faith, even hold them for any purpose of their own. Their duty was to sell, as other lands—by pre-emption sale, an "existing law"—at $1 25 an acre.

As the United States could not hold the lands as *their own, there was a right of property independent of*

them, and this right—an equitable right—was in the Indians. Then their title was not extinguished.

No inference against the trust can be made, because a part of these lands are called "ceded lands" and a part "trust lands."

The treaty does not so call them. And if it did, the court will not stick in mere words. "*Qui haeret in lettera, haeret in cortice.*"

The real question is, what is the effect at law and in equity of the treaty? Its character is to be determined by what it requires.

It will be seen, the first article does not sell the lands for a price agreed on, and paid, or to be paid at all events, irrespective of the proceeds to arise from the sale.

It is a grant on condition and for the purpose of making sales to reimburse the cost of survey and sale, to reimburse $300,000 advanced, and to place the residue of the proceeds of sale to the credit of the civilization fund for the benefit of the Indians. No inference can be drawn against the trust either because the second article of the treaty cedes other lands in terms "*in trust.*"

There is really no reason for the use of any difference in phraseology, as there is no difference in effect. The Indians were not lawyers. They saw what was to be done with the lands—they understood the purpose, but did not stop to make fine distinctions in words or affix technical meanings to them. But it is clear enough that the ceded lands were to be sold for one purpose or several purposes, while the so-called trust lands were to be sold for a totally different purpose—to raise a fund, the interest of which *should be devoted*

"to building houses, purchasing agricultural implements and stock animals, and for the employment of a physician and mechanics," &c.

And these different purposes show reasons for devoting one part of the lands for one set of objects and another part for different objects.

There are many authorities which show that these articles of the treaty only *created trusts, but did not extinguish the Indian title;* that the Osage Indians are the equitable owners and beneficiaries, and that if the United States could be sued in a court of equity the execution of the trust would be decreed and a sale of all the lands directed—the ceded lands equally as well as the trust lands—and no lawyer can dispute it.

In Perry on Trusts, there is a discussion of cases in which "property is given to a person with a power to dispose of it for a particular purpose."

Perry says:

"In dealing with the cases that have arisen upon these inquiries, courts have distributed powers into *mere powers*, and *powers coupled with a trust* or *powers which imply a trust. Mere powers* are purely discretionary with the donee: he may or may not exercise or execute them, &c. * * * *

"It is different with powers coupled with a trust, or powers which imply a trust. In this class of cases the power is so given that it is considered *a trust*."—(Sec. 248.)

And again:

"No particular form of words is necessary to create a power of sale. Any words which show an intention to create such power, or any form of instrument which imposes duties upon a trustee that he cannot perform without a sale."

Hilliard says:

"No particular form of words or expression is required to create a trust, provided the language used clearly indicates on the part of the trustee that the land is held by him in trust, or if the papers by which he holds it indicate the same."—(2 Real Prop., 467,) [192.]

Hilliard, referring to mere powers, or, as he calls them, "*bare powers*," says:

"If the power be simply one in which no person is interested *except the donee*, it is a matter of election on his part whether to exercise it or not.

"But if the power be a trust, equity will enforce its execution. * * * If the power be coupled with a trust *in which other persons are interested*, as a power to executors to sell to pay debts, a court of equity regards it as a duty in the donee, and will compel its execution."—(2 Real Prop., 618,) [325.]

In Cholmondely *vs.* Clinton, (2 Jacobs and Walker, Ch. R., 148,) it is said of the estate of a *cestui que trust*—

"The equitable estate in this court *is the same as the land*, and the trustee is considered as a *mere instrument of conveyance*."

Washburn says:

"The cestui que trust *is seized absolutely of the freehold* in the consideration of the court of equity."—(2 Real Prop., [182,] 455.)

From all these it results that *the whole Indian race* are interested in the "civilization fund" to arise from these lands; that the Osages are interested in a sale of lands to pay a debt for money advanced them; that the United States have no title in their own right; that they hold the lands not with a *mere* or *naked* power of

sale, but as a trustee, and that the beneficiaries in the trust have an equitable estate of which they are seized absolutely, and which is the same as the land; that the Indian title has never been extinguished, and that the lands are *not* "public lands."

PART III.

GENERAL PROPOSITION.

The Osage treaty proclaimed January 21, 1867, (14 Stat., 687,) *does not make, or by any means secure, a grant of land in aid of the construction of a railroad.*

DIVISION I.

The treaty does not, by force of its own words or purpose, make a grant of land in aid of the construction of a railroad.

DIVISION II.

The treaty does not attempt to give construction to the act of Congress of March 3, 1863, (12 Stat., 772,) so as THEREBY *to make such grant. It cannot do so.*

DIVISION III.

The treaty does not "recognize" the existence of such a grant, and if it did, it could not thereby make it operative.

DIVISION IV.

If this treaty was designed to accomplish any of these purposes, it could, as to them, only be a "contract," not operative *per se*, but only by aid of express legislation.

DIVISION V.

The treaty power under the Constitution cannot, for infra-territorial purposes, grant lands in aid of railroads, or otherwise construct internal improvements.

If this treaty could make or in any mode effect a railroad land grant, it must be in one or more of the three modes first above indicated, for no other has been suggested or can exist.

It is important to bear in mind that, as the Railroad Company claims a grant by virtue of the treaty, it assumes the *onus* of showing it.

And the company encounters two rules of construction: first, that if there be "any doubts from any obscurity of the" words of the treaty, the claim of a grant fails; and, second, that "the language used should never be construed to the prejudice of the Indians."

The treaty was originally concluded September 29, 1865. It was submitted to the Senate, and its ratification advised, with an amendment known as "the Senate amendment," June 26, 1866. The Indians accepted the amendment September 21, 1866, and the treaty was proclaimed and took effect January 21, 1867.

The first article, with the "Senate amendment," included in brackets, is as follows:

"ARTICLE 1. The tribe of the Great and Little Osage Indians, having now more lands than are necessary for their occupation, and all payments from the Government to them under former treaties having ceased, leaving them greatly impoverished, and being desirous of improving their condition by disposing of their surplus lands, do hereby grant and sell to the United States the lands contained within the following boundaries, that is to say: Beginning at the southeast corner of

their present reservation, and running thence north with the eastern boundary thereof, fifty miles, to the northeast corner; thence west with the northern line, thirty miles; thence south fifty miles, to the southern boundary of said reservation, and thence east with said boundary to the place of beginning: *Provided*, That the western boundary of said land herein ceded shall not extend further westward than upon a line commencing at a point on the southern boundary of said Osage country, one mile east of the place where the Verdigris river crosses the southern boundary of the State of Kansas. And in consideration of the grant and sale to them of the above-described lands, the United States agree to pay the sum of three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians, in the Treasury of the United States, and interest thereon at the rate of five per centum per annum shall be paid to said tribe semi-annually, in money, clothing, provisions, or such articles of utility as the Secretary of the Interior may from time to time direct. *Said lands shall be surveyed and sold under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws,* [INCLUDING ANY ACT GRANTING LANDS TO THE STATE OF KANSAS, IN AID OF THE CONSTRUCTION OF A RAILROAD THROUGH SAID LANDS,] *but no pre-emption claim or homestead settlement shall be recognized;* and after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sale shall be placed in the Treasury of the United States to the credit of the 'civilization fund,' to be used under the direction of the Secretary of the Interior for the education and civilization of Indian tribes residing within the limits of the United States."

I now proceed to maintain the propositions stated.

DIVISION I.

The treaty does not, by force of its own words or purpose, make a grant of land in aid of the construction of a railroad.

SECTION 1. *The language inadequate to make a grant.*

1. The words of the treaty relied on as intending to make a grant are these:

"Said lands shall be surveyed and sold under the direction of the Secretary of the Interior on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws."

And the added words of the Senate amendment of June 26, 1866:

"Including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands; but no pre-emption claim or homestead settlement shall be recognized."

This court has said that—

"Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."—(Fisher *vs.* Blight, 2 Cranch, 358–399.)

Sedgwick says this rule "is cardinal and universal." (P. 194.)

On the words of the treaty, then, let us inquire: What shall be done as to these lands? Are they granted in aid of the construction of a railroad?

The treaty answers:

"Said lands shall be surveyed and sold."

How much of them?

The treaty answers:

"*Said* lands"—that is, *all* of them.

No rule of law or reason permits the court to say "said lands" do not mean *all* of said land, for there are no qualifying words, or words to limit the amount, and no means to determine *what part*, if not all.

How shall *all* said lands be surveyed and sold?

The treaty gives three directions as to the survey and sale:

1. "Under the direction of the Secretary of the Interior."

2. "On the most advantageous terms, for cash."

3. "As public lands are surveyed and sold under 'existing laws,' including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands."

Here are the three directions.

To what do they all relate?

Every one to *the survey and sale.*

When a *sale* only is directed, as the *sole* disposition of the lands, it would be a clear *interpolation* or *addition* to say a different disposition should be made by grant of any part in aid of a railroad.

There is not one word here in relation to a railroad grant.

It is impossible to believe that, if any such grant had been intended, that every word would have been omitted which could make any such purpose manifest. The claim of the Railroad Company is, that the "Senate amendment" shall be read as if it said, *as it does not*—

"That said lands shall be surveyed, sold, [and granted in aid of the construction of a railroad through said lands,] under existing laws, including any act granting lands to Kansas."

But the treaty does not so read. It has not these words, nor any equivalent words.

And if the power could be now *usurped* to interpolate the word "*granted*," as it cannot, even then how is it to inure to the benefit of *these* companies? It could only, then, by a forced and unrighteous construction, be made to grant lands to Kansas, but which of the companies shall take? If it is construed to mean that the *sale* shall be in the mode prescribed by the acts granting lands to Kansas in aid of a railroad through the lands, then you can take "*any* act," for the provisions on this subject are alike in all. But there are land grants to more than two companies, and no mode of deciding which shall take, or how an apportionment shall be made.

And if this word "*granted*" could be interpolated, still it is subject to the limitation that the lands "shall be sold or granted for *cash*"—not given without cash.

When learned lawyers, and Secretaries of the Interior, and other officers, cannot agree as to the meaning of the "Senate amendment," it is extremely unreasonable to believe that illiterate savages knew it was designed to make a railroad grant.

They were ignorant of our language, knew nothing of railroads, cared less, heard the amendment poorly translated through an interpreter, caught the meaning of the clause which required a sale of all the lands, and then the court is asked to believe that what is

plain to nobody else was plain to them—that a railroad grant was made!

But no such words are used. Whatever this clause may mean, it is clear from the words employed that no railroad grant was made or intended.

But this is by no means necessary to defeat such grant. Even if there be "any doubt from any ambiguity," such grant must fail.

And there can be on the words of this treaty no doubt of this—it does not go beyond "existing laws."

It does not give *any new right* to the Railroad Company, or create any *new law* in its favor, because, by its very terms, the disposition of the lands is by *sale*, and is expressly limited to "existing laws."

When we compare the brief and indefinite words of the "Senate amendment" with the many provisions of the acts of 1863 and 1866, it is impossible to conceive that it was designed in the one to accomplish that which required so many words and provisions in the other.

Whatever meaning these words may have, they do not make a railroad grant. And when no such grant can be extracted from the words employed, *no rule of construction allows* AN INTERPOLATION *or* ADDITION *of words to create it.*

In Rex *vs.* Poor Law Commissioners, (6 Ad. and El., 7,) Coleridge, J., said:

"The longer I sit here the more I feel the importance of seeking only the meaning of a statute according to a fair interpretation of its words, and resting upon that."

In Rex *vs.* Barrell, (12 Ad. and El., 468,) Patteson, J., said:

"I see the necessity of *not importing into statutes*

words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty."

In Everett *vs.* Wells, (2 Scott, N. C., 531,) Tindal, C. J., says:

"It is the duty of all courts to confine themselves to the words of the legislature—nothing adding thereto, nothing diminishing."

If a railroad land grant had been intended it would have been an easy matter to have made it plain.

It should be noted, too, that in all the land grants heretofore made none has been left to turn on so vague a phrase as that now claimed.

The court, then, will not interpolate or add words to create a railroad grant where the language employed admits of no such purpose, but clearly negatives it.

SECTION 2. The inquiry may be made—what *is* the purpose of the words declaring that these lands shall be "surveyed and sold under existing laws, including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands?"

a. It is not the business of the United States in this case to explain or furnish any meaning. The very fact that there is difficulty in finding any is conclusive against the pretended railroad grant.

In Green *vs.* Wood, (7 Q. B., 178–185,) Lord Denman said:

"If we find language used which is incapable of a meaning we cannot supply one. It is extremely probable that the alteration suggested would express what the legislature meant, but we, looking at the word as judges, are no more justified to introduce that

meaning than we should be if we added any other provision."

b. But if there be any meaning in the phrase, "existing laws, including any act granting land," &c., one thing is certain, they are only the laws, or provisions of such laws, *as relate to the survey and sale of lands.*

The language employed makes this clear. But if it were even doubtful, it could not include a provision for a railroad grant, for a *doubt* does not make a grant.

In the instructions of the Secretary of the Interior to the Commissioner of the General Land Office of July 20, 1869, in relation to the Osage lands, Secretary Cox says:

"The Senate amendment inserts after 'laws' the words 'including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands.' I have serious doubts whether those words can, by any just rule of interpretation, be construed to apply to any other provisions of such an act than *those which relate to the survey and sale of lands.*"

Then, if there be "serious doubts," the terms of the treaty cannot go beyond the provisions relating to survey or sale. They cannot operate as or in aid of a grant.

The natural import and grammatical construction of the words limit them as Secretary Cox does.

And the rule of construction, "*noscitur a sociis,*" equally requires that they be interpreted as relating only to a sale of lands. This is the subject-matter of the whole clause.

c. If it be absolutely necessary to give some effect to the Senate amendment, as it is not, it *can be done* by requiring the Osage ceded lands to be in the language of the treaty:

"Sold under the direction of the Secretary, on the most advantageous terms, for cash, as public lands are *surveyed and sold* under existing laws, including any act granting lands to the State of Kansas, in aid of the construction of a railroad."

Now, the two things to be done are to—(1) *survey*, and (2) *sell* the lands.

There are "existing laws" regulating the survey, and as to that there would be no difficulty.—(1 Lester, 703–'17–'27; 2 Lester, 47.)

There are "existing laws" regulating the *sale* of lands.—(1 Lester, 34, 342; Zabriskie, 417; 4 Opinions of Attorneys General, 167;) and they were at one time deemed so far applicable to *these lands* that the President issued a proclamation for their public sale, which was afterwards revoked.

And there are "existing laws" regulating the sale, *including the Kansas land-grant acts.* All these acts contain this, or a substantially similar provision.—(2 Lester, 75, 118, 178, 184, 194:)

"That the sections and parts of sections of land which by such grant shall remain to the United States within ten miles on each side of said road and branches, shall not be sold for less than double the minimum price of the public lands, when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder, at or above the increased minimum price as aforesaid: *Provided, That actual and bona fide settlers under the provisions of the pre-emption and homestead laws of the United States may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid: And provided also, That settlers on any of said reserved sections under the provisions of the homestead law who improve, occupy, and cultivate*

the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each; anything in this act to the contrary notwithstanding."—(Sec. 2, act of 1863, 12 Stat., 773.)

The "Senate amendment" possibly may have been designed to require first a public sale, and then sales by private entry at the double-minimum price.

d. Or it may have been a provision in favor of allowing a sale by pre-emption claims, as regulated by the land-grant acts. The treaty does not exclude *all modes* of securing pre-emption claims and homestead settlements. It only declares that the *treaty itself* shall not "recognize" any *then existing* pre-emption or homestead settlement other than those provided for in Article IV, for this would secure an advantage to a class of intruders not protected by that article. It was made just after the war and only secured "*loyal*" persons, or "members of any tribe at peace with the United States." Many of the Indians south of Kansas had gone into the rebellion, and the treaty said they should not have pre-emption rights by virtue of Article IV.

The treaty then does not exclude sales by pre-emption entries, for that is a mode of selling for cash. It is an "existing law." This is the view Congress took by the joint resolution of April 10, 1869. But if it was intended to exclude this mode it only proves that the Indians desired a sale for cash in hand and not a railroad grant.

e. It is possible, too, that the Senate amendment may have been designed as a simple declaration that IF in "any act granting lands to the State of Kansas

in aid of the construction of a railroad through said lands," any rights may be claimed as having vested, nothing herein shall defeat or affect such rights.

This could have no effect in making a grant, or construing one, but only declare that the treaty should not divest any rights if any existed.

The fact is, it is so vague it is impossible to affix to it any legal meaning, or give it any effect.

SECTION 3. *The "Senate amendment" cannot be construed to make or recognize a railroad grant, because this would defeat every purpose manifest in the treaty.*

The treaty shows that it was the purpose of the Indians to raise money by a sale of their lands. This purpose overrides every other consideration.

The treaty sets out by saying—

"The Indians (1) having now more lands than are necessary for their occupation, and (2) all payments from the Government to them under former treaties having ceased, (3) leaving them greatly impoverished, and (4) being desirous of improving their condition *by disposing of their surplus lands*, do hereby grant and sell to the United States" the Osage ceded lands, &c.

Here are the *reasons* for the cession, and good reasons they are.

But from this cession they reserve certain lands.

By Article III they declare that "being sensible of the great benefits they have received from the Catholic mission" they stipulate that Father Schœnmaker of the mission shall have the privilege of selecting two sections of lands "on the payment of $1 25 an acre."

By Article IV provision was made that loyal citizens or members of any tribes having made settlements and improvements, of which there were made 144, might buy, at $1 25 an acre, each a quarter section. They

did so, taking 22,315 $\frac{74}{100}$ acres of land, for which they paid $27,894 67.

By Article IX "in consideration of the services of Darius Rogers" he is permitted to take two quarter sections at the same price.

The treaty gives the reasons for selling select lands to benefactors of the Indians and to members of any tribe. And yet the court is asked by the Railroad Companies to believe that these Indians, who gave reasons for every thing else, gave away by far the largest part of their lands to these companies without any reason at all; that these Indians, who required pay of their acknowledged benefactors, gave away for nothing nearly all their lands to railroad companies, whose officers they did not know, and from whom they had received no favors, and for railroads for which they had no use; that these Indians, who even required pay from members of their own or other tribes to whom they were bound by kindred and affection, would make a vast gratuity to a corporation for which they had no concern.

The treaty says, the Indians were desirous of improving their condition by disposing of these lands. For this purpose it declared that $300,000 should be raised to reimburse the United States for that sum advanced them as a permanent fund for annuities, and $20,000 "for expense of survey and sale of the lands ceded," and still more was to be raised by a sale of lands, and the treaty says, "the remaining proceeds shall be placed in the treasury of the United States to the credit of the 'civilization fund,' to be used under the direction of the Secretary of the Interior for the education and civilization of Indian tribes," &c.

This evidently contemplates a sale of all the lands, for *in no other way could the necessary sums be raised.*

To carry into effect this purpose, the treaty says, "said lands shall be sold for cash."

There could be and was raised under the 4th article of the treaty, $27,894 67, and an insignificant sum under other special treaty sales. But if the treaty and laws shall be executed according to the claim of the two Railroad companies, they would take so much of the lands that the great purposes of the treaty would be defeated.

Their claim is, that both companies are entitled to all the odd sections within the ten-mile limits, as granted *in place;* that the Leavenworth, Lawrence, and Galveston Railroad Company was entitled to indemnity selections of odd-numbered sections outside of the ten-mile limits and within the twenty-mile limits, to be selected by the Secretary of the Interior, and that the Missouri, Kansas, and Texas Railroad Company was entitled to indemnity selections within the same limits, in both odd and even sections. If there was a grant there could be no indemnity selections within the ten-mile limit, because the lands within these were required by the land-grant acts to be sold at the double-minimum price.

The lines of these roads were definitely fixed and certified in February, 1868, and the Interior Department holds that the right to indemnity selections *then* attached, even though the selections were subsequently made, and that entries by citizens are void if made after the location of the roads, and they are accordingly held for cancellation in the Interior Department, awaiting only the decision of this court.

And it is to be remembered, too, that *if the railroad grant attaches in these lands, the grants for the two roads overlap, and the ten-mile limits of each, in part, become the indemnity limits of the other, so that grants* IN PLACE *and* INDEMNITY *grants, occupy the same limits, and thus nearly all will be swallowed up,* according to the Railroad companies' claim.

It was in view of this, probably, that Judge Curtis, in his argument of December, 1871, said:

"It is of no consequence in this case, whether both acts made a grant, or one of them; and one, which one; because, as I understand it, in either case all the lands will be covered."

The treaty says that all the lands shall be sold for cash. The Railroad claim says they shall not. The treaty says that after reimbursing $300,000 advanced, and $20,000 for expenses of survey and sale, the residue shall go to the credit of the "civilization fund." Other parts of the treaty show a desire to educate and civilize. The famous "peace policy" of the Government was just then in process of execution as to the Indians.

But the Railroad claim would leave no money to go to the civilization fund.

It is no answer to this to say, as Judge Curtis does, (p. 15, 23,) that the sales have realized $439,053 10 from these lands. The question is not what has resulted by the energy of settlers from sales under the joint resolution, as he says, (p. 15,) "against the formal protest of railroads," but what does the treaty mean in the light of what was possible and probable if the railroad companies had immediately located their roads and secured what they claim.

And Judge Curtis was mistaken. The Commissioner of the General Land Office, in a letter of February 10, 1875, says that—

"Under the joint resolution of April 10, 1869, 3,365 'declaratory statements' were filed upon the ceded tract, embracing an estimated average of 120 acres each, an aggregate of 403,800 acres."

But these did not all "prove up" and make payment. There were, in fact, only 2,295 entries perfected, "aggregating $235{,}436\frac{58}{100}$, which, at $1 25 per acre, would amount to $292,545 72."

[This corrects the statement on page 40 of this brief, as to the number of settlers, amount of land taken by them, and money realized from sales.]

And it is to be remembered that a large part of all the entries from which the money was raised, are held for cancellation by the Interior Department, and they only await the decision here, and, if cancelled, the money must be refunded.

The Railroad Companies ask a construction of the treaty to the prejudice of the Indians.

"THE LANGUAGE USED IN TREATIES WITH THE INDIANS SHOULD NEVER BE CONSTRUED TO THEIR PREJUDICE," said Chief Justice Marshall, in Worcester *vs.* The State of Georgia, (6 Peters, 515.)

It cannot be said that the Indians or the "civilization fund" would lose nothing by giving one-half of the land to the railroad companies, because the other half would be sold for the "double-minimum" price, as the acts of 1863 and 1866 require, and so realize as much as all if sold at $1 25.

There are several answers to this.

a. It *assumes* what does not necessarily follow, that one-half could be sold at $2 50 per acre. The chance to sell all at $1 25 is certainly better than to sell half at $2 50; and if half can be sold at $2 50, the other half could be sold for as much. And if *all* the lands were open to sale to actual settlers, with railroads already in operation, independently of any grant in *these lands*, they would sell more rapidly and certainly than if one-half were to be held out of market at high prices, awaiting the pleasure of a Railroad company to sell for their own benefit. This assumption also overlooks the important fact that the two railroad companies would swallow up every acre, both odd and even sections, for indemnity lands outside of the ten-mile limits, and nothing could be realized from any half there.

b. If the whole were sold under proclamation, at *public sale*, under an "existing law," the half would not sell for as much as the whole.—(Zabriskie's Land Laws, 417; Opinion of Attorney General, March 29, 1843, volume 4, p. 167.)

c. And if the Railroad companies took half the lands by virtue of the treaty, the residue, so far as sold at private entry under existing laws, would be at the *minimum* and not the double-minimum price. The act of March 3, 1853, only adopts the double-minimum price for alternate sections where a grant has been made "by act of Congress," (10 Stat., 234,) not where it is made *by treaty*.

d. The question is not whether the lands would realize as much if the railroad grant is allowed, but *what*

did the treaty agree to do. It *did agree* that all the lands should be sold, both in the ceded lands and in the trust lands. The Indians had no reason to make provision for the benefit of the railroad companies. They were already fixed facts—certain to be made, as they have been.

SECTION 4. *The condition of the "trust lands" shows no railroad grant attached in the "ceded lands."*

Secretary Browning decided that no railroad grant attached to the *trust lands*, because "the United States took no beneficial interest in them." The treaty "constituted them a trustee, with a naked power to sell." (His opinion, this brief, p. 37, *ante.*)

And, therefore, the savages who agreed to this treaty, by this refined distinction between the *trust* and *ceded* lands, intended to give nearly all the "*ceded lands*" to the railroad companies, but none of the "*trust lands!*"

It has been already shown that the United States *took no beneficial interest in the ceded lands.*

The Secretary is undoubtedly correct in the conclusion, but not in his reasons for it, that no railroad grant attached to the trust lands. But in legal principle there is no difference between the *status* of the two classes of lands.

The second article of the treaty uses the word *trust* and the first does not, but the United States assumed a similar duty as to both. If it could be a trust as to the trust lands, it was equally so as to the ceded lands. In both cases the duty was to sell.

It is well settled that—

"No particular form of words is requisite to create a trust. The court will determine the intention from the

general scope of the language."—(10 Johns. N. Y., 496; 4 Kent's Com., 305.)

The purposes to which the money arising from the sale of the trust and ceded lands is to be applied are different, but in both cases they are *Indian purposes*, and in neither case is the Government to be benefited. There can be no difference in fact or legal effect as to the *status* of the trust and ceded lands, or the position of the United States, and if the State of Kansas can take nothing in the trust lands it can take nothing in the ceded lands, so far as any question yet presented is concerned.

And if the Secretary was correct in holding that no grant attached to the ceded lands, then the acts of Congress do not, *ex proprio vigore*, make any grant of any of the Osage lands.

It is perfectly certain that if any grant attached *by force of the act of* 1863 in the Osage lands, it attached as well to what are called the trust lands as the ceded lands.

The claim of the Railroad companies is just as valid in the trust lands as in the ceded lands. Yet they have quietly acquiesced in the ruling of Secretary Browning that they can take none of the trust lands. If they felt their claims as to any of the land clear, they would not have acquiesced in that ruling. And the same may be said of the diminished reserve.—(See treaty, art. 16, and act of July 15, 1870, 17 Stat., 362.)

And if they had supposed they had any valid claim, they would not have delayed the location of the roads until January, 1868.

SECTION 5. *The omission of any provision in the treaty to determine how the lands should be divided between the Railroad companies, is evidence that it made no land grant in their favor.*

When the Osage treaty was made, and when the "Senate amendment" was accepted, September 21, 1866, both the railroad companies were claiming, under the act of 1863, a land grant *north of the Osage ceded lands.*

The map of the definite location of the line of the Union Pacific Railroad Company, southern branch, (now Missouri, Kansas, and Texas Company,) from Junction City *to the northern boundary of the Osage lands*, was filed with the Secretary of the Interior November 26, 1866. A statement of the president and attorney of the company, filed with it, "declaratory of the purposes for which the said company presented and filed said map," shows that the company claimed—

"All the grants for the construction of a railroad, on any part of said line, made to the State of Kansas by the acts of Congress approved March 3, 1863, and July 1, 1864, said lands having been assigned to it by the Atchison, Topeka, and Santa Fé Railroad Company, to which they were granted by the State by an act approved February 9, 1864, accepting said grants; and that we also claim all the lands granted to the State of Kansas for the Union Pacific Railway (southern branch) Company by the act of Congress approved July 26, 1866."

If the *treaty* intended to make *of itself* any grant for railroads "through said lands," it intended to make it for both companies. But it provides no mode

of dividing the lands between them, or of determining how they should be divided.

Hence, a contest arose between these companies as early as February, 1870, each claiming priority. There never was any judicial or departmental decision of that question. But it is known, as a matter of history, it was compromised by an agreement between the companies to make an equal division. They seemed to avoid any public discussion or controversy which might show that the claims of both were an *afterthought*, never asserted until April, 1867, when it was rejected by the General Land Office

As to the Missouri, Kansas, and Texas Railroad Company, it is "worthy of remark that in the certificate to map No. 3, (dated November 17, 1866,) these Osage lands are recognized by the officers of the Railroad company, as well as by the Governor of the State of Kansas, *as the Osage Indian Reserve.* It is *so called in the certificates*, and no claim was set up at that time to any portion of any of the Osage Indian Reserve. The plat of the land claimed by the road ends at the northern boundary of this Indian Reserve."

But if there was by the treaty a grant at all, it was of the *same odd sections in place* to two different companies, with no provision for a division. No contract or compromise could make a law for the division.

It is impossible to conceive that the treaty would make a land grant of the *same identical lands* to two companies, and equally incredible, that if a grant was intended for both no provision would have been made for a mode of selecting the lands each should take.

Disposition of the lands was to be made, as the treaty

says, "under existing laws," and these laws do not contemplate or provide for any such case.

The treaty, therefore, did not design to make a railroad grant.

SECTION 6. *The provision as to right of way shows there was no railroad land grant.*

The treaty shows that where it was designed to make any provision in favor of a railroad company, or for public improvements, it is done in no equivocal words.

By article eleven, the right of way is secured for roads and highways laid out by the State or General Government and for "railroad companies." Now, when the treaty is thus specific and careful in these and all other provisions, a railroad land grant should not be made out of ambiguous words by mere forced construction when a Railroad company is not even named in that connection.

It cannot be said that this article is limited to the diminished reserve, or to this and the trust lands.

The article is divided into two distinct parts. The first part gives a right of way for ordinary roads of the National or State Government through the lands "therein reserved." The only lands "reserved" are those reserved for the Catholic mission, for settlers, and favored individuals, by articles 3 to 9, both inclusive. As to these, it was necessary to save a right of way for the State and nation for roads.

The act of 1863 *had not given a right* of way for the railroad through *any of these lands.* It had given it "*subject to the approval of the President.*" But it was necessary the Indians should consent. The second part of this article, XI, gives the right of way for all

railroads through *all their lands*. If this is not so, this Railroad Company has even yet no right of way over these lands. This provision must be deemed to give it, for while treating on the subject, it is to be presumed the whole subject was provided for.

And upon the authority of 5 Opinions, 578, the right of way was not given by the acts of August 4, 1852, (10 Stat., 28,) of March 3, 1855, (10 Stat., 683,) nor of July 15, 1862, (12 Stat., 577,) for these only gave it through the "*public lands*."

Division II.

The treaty does not attempt to give construction to the act of Congress of March 3, 1863, (12 Stat., 772,) so as thereby to make a railroad land grant. It cannot do so.

Here are two distinct principles:

1. *The treaty does not attempt to construe the act of* 1863.

Section 1. *The language of the treaty shows this.* It is not pretended that any part of the treaty has any relation to this subject, but the "Senate amendment."

The provision of the treaty relating to the disposition of the lands, with the "Senate amendment" in [brackets,] is as follows:

"Said lands shall be surveyed and sold under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold *under existing laws*, [including any act granting lands to the State of Kansas, in aid of the construction of a railroad through said lands,] but no pre-emption claim or homestead settlement shall be recognized."

It is perfectly clear that this language cannot *give* any *new right* to any railroad company.

It limits in express terms whatever disposition is made to "existing laws." It does not profess to construe them or say what they mean.

Where are the words which profess to explain any existing law? They are not to be found.

What is the construction? It is not found.

A statute which attempts to construe a prior one may either *express an opinion* as to what it means, or give it a construction *designed to have* the *force of law in the future*, which in fact *is an amendment* of the former law—a change in the law.—(Sedgwick on Stat., 2d ed., 214–227, *n.* See cases in this brief, Part V.)

But here are no words employed to indicate either purpose.

Where *an amendment* is made, the purpose to do so must be clear. There is no such purpose here expressed, but the words "existing laws" expressly negative any such purpose.

SECTION 2. It is impossible to believe that the Senate would attempt any such construction. No treaty has ever yet attempted to make a *construction* of a statute. It would be a usurpation of judicial power. This is shown fully by authorities hereafter cited.—(See Part V.)

An act of Congress may be changed by a subsequent act of Congress in its *future* effect, or by an act declaratory of its meaning, but it cannot be changed by an Indian treaty. This requires an exercise of *congressional legislative power*. If a treaty can amend an act of Congress to make a land grant, it may amend it to

prohibit land grants. It may undertake generally the work of internal improvements, and usurp all legislative power. This can never be tolerated.

2. *A treaty cannot construe an act of Congress.*

SECTION 1. Congress can amend or alter its own laws so as to make the amended law a rule for the future. But it cannot by any declaratory act, "recognition," or expression of opinion, direct the courts how "existing laws" shall be construed as to past transactions or rights. This would be a usurpation of the *judicial power*, which has exclusive authority to interpret laws. This is sufficiently shown hereafter.—(See this brief, Part V.)

For the same reasons the treaty power can exercise no such authority.

SECTION 2. But the treaty power, unlike congressional power, can not amend or give construction to an act of Congress on a subject of purely internal administration, so as to give such act a new and different effect.

It is sufficiently shown that no attempt has been made to do so.

But if there had, it would have been without effect. It would be unauthorized by the Constitution.

The departments of government are independent. If the treaty power can interfere with the power given to Congress to make "all needful rules and regulations respecting the territory and other property of the United States" for purposes of purely internal administration, then there is no legislative power it cannot an-

nihilate. But it cannot be necessary to pursue this subject here.

If further argument could be needed it will be found in the briefs used in the case of Holden *vs.* Joy, (17 Wallace, 211.)

Division III.

The treaty does not "recognize" the existence of a prior land grant by the act of March 3, 1863, (12 Stat., 772,) *and if it did, it could not thereby make it operative.*

This statement or proposition includes two distinct principles, which will be separately considered.

1. No treaty "recognition" of a railroad grant.

There is no word in the treaty which looks to a "recognition" of a previous railroad grant by act of Congress.

This results from what has already been said.

Section 1. The provision for a survey and sale of *all* the lands is a *denial* of such grant.

Section 2. By article eleven of the treaty, this provision is made:

"Article 11. It is agreed that all roads and highways laid out by the State or General Government shall have right of way through the lands herein reserved, on the same terms as are provided by law when made through *lands of citizens of the United States*; and railroad companies, when the lines of their roads necessarily pass *through the lands of said Indians, shall have right of way upon the payment of fair compensation therefor.*"

This article is subsequent to that which cedes these lands to the United States for survey and sale *as* public lands are surveyed and sold; and it declares the understanding as *to whose lands they continue to be* until sold.

They are declared to be still "*the lands of said Indians.*"

And because they were so, the *right of way* is given over them for roads and railroads.

This grant of a right of way for railroads is not over such lands as remain after carving out a railroad land grant, but it is over lands covered by words which say that *all* of them are, at the date of the treaty, "the lands of said Indians."

SECTION 3. But the treaty makes provision for the sale of lands utterly inconsistent with the idea of recognizing a railroad land grant.

There were 144 settlers who took $22{,}315\frac{74}{100}$ acres, *odd and even sections*, under article 4 of the treaty. There is in it no reservation of *odd*-numbered sections theretofore granted by the act of March 3, 1863.

If there had been such prior grant, subject merely to the Indian right of occupancy, the treaty would necessarily have saved the rights thereby granted. But it proceeds to deal with the lands, utterly ignoring the idea of a previous railroad grant.

The 144 settlers did not understand there had been a prior grant of these lands. If there had been, and if the railroad demand is sustained, the Railroad companies will, of course, assert a claim to all the odd-numbered sections held by these settlers.

The other sections granted for the Catholic missions, and for other purposes, stand in the same condition, and prove the same purpose.

SECTION 4. In fact, up to that time, nobody had publicly claimed a railroad grant, and hence the treaty entirely ignored it as a matter never heard of.

SECTION 5. Nothing can better illustrate the utter failure to make out any real grant in aid of railroads than the uncertainty where to find it. The "Senate amendment" is relied on to sustain the act of 1863, and the act of 1863 to sustain the Senate amendment. These only *double the doubt*, but do not make a case where two negatives are equivalent to an affirmative. *Ex nihilo, nihil fit.*

It is asserted in the argument of March, 1870, for the Missouri, Kansas, and Texas Company, that—

> "The grants to Kansas for railroad purposes attached in these ceded lands by virtue of the [Senate amendment of the] treaty, and not by force of the acts of Congress."—(See page 46, *ante*.)

Here is a distinct concession that the acts of Congress did not *ex proprio rigore* make any grant in the Osage lands.

The argument of February, 1870, for the Leavenworth, Lawrence, and Galveston Company, declared that the Osage lands "were not grantable at the date of the law," but claimed a grant by the joint operation of the act of 1863 and the treaty. This argument concedes that the act of 1863 did not originally intend to make a grant, but that by the treaty the lands were made "public lands," and as such "would have been

subject to the grant in the act of 1863 without the Senate amendment."—(See page 45, *ante.*)

Secretary Browning put the grant on a treaty recognition.—(See page 38, *ante.*)

Assistant Attorney General Smith put it exclusively on the act of 1863.

Here are no less than four distinct opinions.

It has been well said by an eminent lawyer and judge, in relation to this "Senate amendment," that—

"One cannot help wondering how anything could be made so obscure by accident, and it has greatly the appearance of having been smuggled into the treaty to deceive somebody; to make the Indian and other honest people believe it meant one thing while the speculator might interpret it to mean a different thing."

If this can be made available to secure a grant, then but one element is wanting to fill the measure of Herbert Spencer's denunciation, when he said:

"Violence, fraud, the prerogative of force, the claims of *superior cunning*—these are the sources to which those titles may be traced."—(Social Statics.)

And in the vigorous language of the learned judge already quoted, if a railroad grant is sustained—

"This nation will stink in the nostrils of the civilized world as the swindler of ignorant savages and the breaker of solemn treaties"—

For certain it is, the Indians never understood they were making any such grant.

SECTION 6. But if the "particular Senator" who drew the "Senate amendment" did intend to recognize a railroad grant, it does not follow that *his purpose* is to be carried into effect. The treaty is to be construed

as the Indians understood it from the language employed. That is sufficiently certain from the opinion of Attorney General Akerman, of December 15, 1870, which was given upon the construction of the acts of Congress relating to the payment of interest on subsidy bonds given to the Union Pacific Railroad Company. He said:

"An argument against the conclusion to which my mind has come has been founded on the language of members of the House of Representatives when the act of 1862 was under consideration. In expounding an act of Congress, the construction placed upon it by individual members of Congress in the debate which took place on its passage cannot be considered."—(Eldridge *vs.* Williams, 3 How., p. 1; 6 Opinions, p. 464; 9 Opinions, p. 59.)

And the rule of construction must not be overlooked, that the "language of treaties is never to be construed to the prejudice of the Indians."

2. IF THE TREATY "RECOGNIZED" A PREVIOUS RAILROAD LAND GRANT IT WOULD NOT THEREBY BECOME OPERATIVE AS SUCH.

It is one thing to make a grant, and a very different one to "recognize" it as having been made.

Unless the act of March 3, 1863, in fact made a grant in these lands, no mere "recognition" of such grant could make the act so operate.

This will be shown hereafter in Part V of this brief in the discussion of the "Thayer act," where it is shown that a mere opinion expressed in a law or treaty as to what the law is does not make it so. "That which has not been law heretofore must be enacted [by the law-making power] to make it so."

DIVISION IV.

If this treaty was designed to make a railroad grant, or to give construction to the act of 1863, *it could at best only be a* CONTRACT, *but would not be operative* PER SE.

It can scarcely be possible in this case to reach a decision of this question. If the preceding DIVISIONS of this PART of this brief are correct, then this question will be immaterial. But few words will therefore now be devoted to this subject.

It is clear that the first article of the treaty is not a law, operative *per se*, but is a *contract* to be executed by act of Congress in a mode left to its judgment.

SECTION 1. The first article of the treaty cedes the so-called "Osage ceded lands" to the United States. It then proceeds—

"And *in consideration* of the grant and sale to them of the above-described lands, the United States *agree* to pay the sum of three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians, in the treasury of the United States, and interest thereon at the rate of five per centum per annum shall be paid to said tribe semi-annually, in money, clothing, provisions, or such articles of utility as the Secretary of the Interior may from time to time direct. Said lands shall be surveyed and sold," &c.

This is the language of a *contract*—not of a law. It requires an act of Congress to execute it. On this subject I submit some authorities:

The eighth article of the treaty with Spain of February 22, 1819, provides that—

"All the grants of land made before the 24th of January, 1818, by His Catholic Majesty, &c., shall be ratified and confirmed to the persons in possession of the

lands to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty."

In Foster & Elam *vs.* Neilson, (2 Peters, 253,) a question arose as to the proprietorship of certain land covered by this article.

Chief Justice Marshall said:

"Do these words act directly on the grants so as to give validity to those not otherwise *valid*, or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?

"A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially so far as its operation is *infra-territorial*, but is carried into execution by the sovereign power of the respective parties to the instrument.

"In the United States a different principle is established. (But see annals of Congress for 1796, p. 525; Federalist, No. 52, p. 63; 1 Benton, Abr., 643.) Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice equivalent to an act of the legislature, *whenever it operates of itself, without the aid of any legislative provision.* But when the terms of the stipulation import a contract, when either of the parties engages *to perform a particular act*, the treaty addresses itself to the political not the judicial department, and *the legislature must execute the contract before it can become a rule for the court.* The article does not declare that all grants made shall be valid. It does not say that these grants are hereby confirmed. Had such been its language it would have acted directly on the subject," &c.

The principle announced is, that a treaty is only an operative law—

"*Whenever it operates of itself without the aid of any legislative provision.*"

And when does it so operate? The authority answers the question: It does *not* so operate—

"When either of the parties *engages to perform a particular act.*"

It *does* so operate *only* when it acts "directly on the subject," &c., and illustrations are given when it would be so regarded.

Now to apply these principles to the Osage treaty. By it—

"The United States *agree* to pay, &c., and that said lands shall be surveyed and sold under the direction of the Secretary of the Interior."

Here the United States—

"Engages to perform a particular act."

The treaty does not "act directly" on the land. The treaty, then, is not an operative law any more in regard to lands than to the money to be paid under it.

And see United States *vs.* Arredondo, 6 Peters, 711; United States *vs.* Percheman, 7 Peters, 88.

The same principle was announced in Turner *vs.* American Baptist Missionary Union, (5 McLean, 345,) which involved the treaty-making power.

Justice McLean said:

"A treaty under the Federal Constitution is declared to be the supreme law of the land. This unquestionably applies to all treaties where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and cannot be, the supreme law of the land where the concurrence of Congress is necessary to give it effect. Nor can the courts act under it for the purpose of enforcing its provisions *except in pursuance of a statute.*

"The provision in the Constitution of the United States which declares that the Constitution and the

laws made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, *does not, ex proprio vigore*, and without *legislative* enactment, confer upon the *officers of the National Government the power of executing the stipulations of a treaty.* Where a treaty contains a proviso importing a contract that its terms shall at some future period be ratified and confirmed, such treaty does not execute itself, but it must be executed by an act of Congress before it can become a rule for the decision of the courts."—(See 5 Howard, 176.)

In Taylor *vs.* Morton, (2 Curtis' C. C. R., 454,) it is said:

"Though the treaty with Russia, of December 18, 1832, (Statutes at Large, 444,) stipulated that no higher rate of duties should be imposed on goods imported from Russia than on like articles imported from other places, this court cannot try the question whether a certain species of hemp, on which a duty of twenty-five dollars per ton is imposed by an act of Congress, is, like Russian hemp, within the meaning of the treaty. This is a question for Congress, not the courts.

"The truth is, that clause in the treaty is merely a contract addressing itself to the legislative power. The distinction between such treaties, and those which operate as laws in courts of justice, is settled in our jurisprudence."

The case of Metzger, in 1 Barbour, 248, is an important one. Metzger was claimed under an extradition treaty, there being no law passed to effectuate the treaty stipulation. Edmonds, J., delivered a long and exhaustive opinion, reviewing the judicial action up to that time. Its purport will be gathered from these points in the syllabus, as follows:

"The President of the United States has no authority, by virtue of a new treaty stipulation, and without an

express enactment of the national legislature, to deliver up a resident of this country to a foreign power.

"Upon the principle of the common law a treaty does not execute itself, nor can the courts act under it for the purpose of enforcing its provisions, except in pursuance of a statute.

"The provision in the Constitution of the United States which declares that the Constitution and the laws made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, does not *ex proprio vigore*, and without legislative enactment, confer upon *the officers of the National Government the power of executing the stipulations of a treaty.*

"Where a treaty contains a proviso importing a contract that its terms shall at some future period be ratified and confirmed, such treaty does not execute itself, but it must be executed by an act of Congress before it can become a rule for the decision of the courts."

This whole subject was fully discussed in the briefs in Holden *vs.* Joy, 17 Wallace, 211. And if further argument be necessary, I refer to the authorities there cited.

It is *impossible*, then, that this treaty could make a railroad land grant. Nothing but an act of Congress can authorize officers to perform the duties necessary to make a grant vest in a railroad company.

The treaty cannot even by adopting "existing laws" apply them to the purposes of the treaty.

The authorities say when a treaty is in form of a contract, it must be executed by Congress. Congress alone can apply the existing or other laws.

And this is precisely the view taken by Congress in the joint resolution of April 10, 1869.

DIVISION V.

The treaty power under the Constitution cannot, for infra-territorial purposes, grant land or otherwise construct internal improvements.

If, by any possibility, the Osage treaty could be held to be, in form, a law, operative *per se*, and, as intended, to effect, by any agency or means, a railroad land grant, then I would say it is void, because in violation of the Constitution.

The Constitution declares that—

"The Congress shall have power to dispose of the territory or other property belonging to the United States."

It also says:

"*All* legislative power herein granted shall be vested in Congress."

The power to authorize and regulate the sale of public lands is a *legislative power*. The volumes of land laws prove this.

Now, every treaty which attempts to require the exercise of this legislative power, *infra-territorially*, is inoperative, unless authorized or aided by an act of Congress to execute it.

If more authority be wanting, it is clear that the men who made the Constitution held such treaties inoperative.

In the convention which framed the Constitution, August 23, 1787, Mr. Wilson, discussing the treaty power, &c., said:

"In the most important treaties the King of Great Britain, being obliged to resort to Parliament for the execution of them, is under the same fetters."

On the 15th of August Mr. Mercer said:

"Treaties would not be final so as to alter the laws of the land till ratified by legislative authority. This was the case of treaties in Great Britain, particularly the late treaty of commerce with France."

In No. LXIII of the Federalist, Hamilton says:

"A treaty is only another name for a bargain. * * * The proposed Constitution, therefore, has not in the least extended the obligation of treaties."

In the debate of 1796, Mr. Gallatin, in discussing the treaty power, very conclusively proved that—

"So far as a treaty negotiated by the Executive embraced *legislative objects*, (as selling lands,) so far it required the sanction of the legislature."—(See vol. 6, Hamilton's Hist. Repub.)

The elementary writers give their sanction to this doctrine.

In Lawrence's Wheaton, 457, it is said: "Commercial treaties which have the effect of altering the existing laws of trade and navigation of the contracting parties may require the sanction of the legislative power in each State for their execution. Thus the commercial treaty of Utrecht between France and Great Britain, by which the trade between the two countries was to be placed on the footing of reciprocity, was never carried into effect, the British Parliament having rejected the bill which was brought in for the purpose of modifying the existing laws of trade and navigation so as to adapt them to the stipulations of the treaty."

In the Virginia convention, June 18, 1788, Mr. Corbin proved the same position, and he referred to—

"The last clause of the treaty with France, which gives certain commercial privileges to the subjects of France, to give full effect to which certain correspond-

ing alterations were necessary in the commercial regulations."

Whenever it has been claimed that a commercial treaty could become a supreme law *per se*, it has been *solely* on the ground that the subject-matter was *international* and *extra-territorial*, and with an admission that the treaty power did not reach *infra-territorial* legislative subjects.—(Annals Cong., Jan., 1816, p. 49.)

In 1 Tucker's Blackstone, Appx., 339, it is said:

"What, then, is the effect of a treaty made by the President and Senate, some of the articles of which may contain stipulations *on legislative objects*, or such as are expressly vested in Congress by the Constitution until Congress shall make a law carrying them into effect? * * * The answer seems to be that it is, in some respects, an inchoate act. It is the law of the land, and binding upon the nation in all its parts, except so far as relates to these stipulations. * * *

"The whole, except those stipulations embracing *legislative objects*, might remain a treaty. * * * —(Debate on the treaty-making power, p. 346; resolution of the House of Representatives, April 6, 1796.) * * * A contrary construction would render the power of the President and Senate paramount to that of the whole Congress, even upon those subjects upon which every branch of Congress is by the Constitution required to deliberate. * * * *

"Let it be supposed, for example, that the President and Senate should stipulate by treaty with any foreign nation that in case of war between that nation and any other, the United States should immediately declare war against that nation. Can it be supposed that such a treaty would be so far the law of the land as to take from the House of Representatives their constitutional right to deliberate on the expediency or inexpediency of such a declaration of war, and to determine and act thereon according to their own judgment?"

And see 1 Benton's Abridgment, 671–702; Benton's Thirty Years' View as to Cherokee treaty, p. —; 4 Hamilton's Works, 340; 7 Hamilton's Hist. Repub., 518–556.

The note to Metzer's case, (1 Barb., 258,) already cited, presents the same views.

If a different claim has been made, it has certainly been on the ground that the subject was *international*, and, by the usage of nations, within executive or treaty power.—(1 Woodbury & Minot's R., 66; Ex. Doc. 25, third session 41st Congress; Attorney General Akerman's Op., December 15, 1870; Debates in Congress, 1794, as to Nash *alias* Robbins.)

The treaty cannot confer power on the Secretary of the Interior.

If the treaty could in all other respects be regarded as operative law, it still is inoperative, because it can enjoin no duty on the Secretary of the Interior.

He is an officer whose office is created, and whose duties are prescribed, by act of Congress. If he performs any duty under this treaty, it is not by virtue of his office or power, so far as they rest on the authority of Congress. It must be *solely* by virtue of an *official character* derived from the *treaty*. This treaty does not devolve any duty on a *person named*, nor on an officer appointed *for that purpose*, as the Constitution requires—

"By the President, by and with the advice and consent of the Senate."

That the Secretary of the Interior cannot execute this treaty as a land grant is clear, because he has never been appointed by competent authority for that pur-

pose. It would be destructive of the laws by which, and the duties for which, he was appointed.

Such offices could, in fact, only "be established by law" of Congress.—(United States *vs.* Maurice, 2 Brock, 96.)

Judge Curtis, in his exhaustive opinion in the Dred Scott case, has proved that the power which the Constitution gives to Congress to dispose of the public lands, extends to lands then or thereafter acquired by the nation, (19 Howard, 611,) and that the power of Congress is *exclusive*. He says:

"The Constitution declares that Congress shall have power to make '*all* needful rules and regulations' respecting the territory belonging to the United States. (19 Howard, 615.) * * * The subject-matter is the territory of the United States *out of the limits of every State*, and consequently under the *exclusive* power of the people of the United States, [that is, of Congress.] Their will respecting it, manifested in the Constitution, can be *subject to no restriction.* * * * Where the Constitution has said *all* needful rules and regulations, I must find something more than theoretical reasoning to induce me to say it did not mean all."

1. The act of March 3, 1863, (12 Stat., 793; secs. 4, 5,) authorized the President:

"To enter into treaties with the tribes of Indians * * * in Kansas *for the extinction of their titles* to lands held in common * * * and for *the removal* of said tribes."

The subject-matter upon which he could treat was the *Indian right of occupancy* and their removal. The power to treat is a power to make contracts—to make a treaty at common law—not treaties having the *effect of municipal laws.* It was not a power to do what

Congress only could do. The power here did not extend to the *fee simple of these lands.* It was not a power to *sell* the fee. It was a power to agree to make a *contract* to sell the lands if necessary, but this required the assent of Congress, and law to carry the sales into effect. Congress has so declared by the joint resolution of April 10, 1869, and it only remains for the court to give judicial sanction to the action of the *political department* on a political question.

PART IV.

I. *The joint resolution of April* 10, 1869, (16 Stat., 55,) *affirms that there has been no railroad grant, and as a legislative construction of the act of March* 3, 1863, *is entitled to great weight. It carries out the long-settled policy of regarding Indian reservations* NOT *as "public lands" but as Indian lands, subject to have the Indian title extinguished by treaty, and then sold for the benefit of the Indians.*

II. *As a railroad land grant can only be claimed by operation of the Osage treaty proclaimed January* 21, 1867, *the joint resolution of April* 10, 1869, *is a construction against it, which it is the duty of the court to adopt as final and conclusive.*

DIVISION I.

Upon the question of the *status* of the Osage ceded lands Congress has spoken in the most unequivocal language, after the most mature consideration, and under circumstances which give the opinion expressed a claim to great weight and authority.

Congress passed a "joint resolution," approved April 10, 1869, as follows:

"A RESOLUTION enabling bona fide settlers to purchase certain lands acquired from the Great and Little Osage tribe of Indians.

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That any bona fide settler, residing upon any portion of the lands sold to the United States by virtue of the first and second articles of the treaty concluded between the United States and the Great and Little Osage tribe of Indians, September twenty-ninth, eighteen hundred and sixty-five, and proclaimed January twenty-first, eighteen hundred and sixty-seven, who is a citizen of the United States or shall have declared his intention to become a citizen of the United States, shall be, and hereby is, entitled to purchase the same in quantity not exceeding one hundred and sixty acres, at the price of one dollar and twenty-five cents per acre, within two years from the passage of this act, under such rules and regulations as may be prescribed by the Secretary of the Interior: *Provided, however*, That both the odd and even-numbered sections of said lands shall be subject to settlement and sale as above provided: *And provided further*, That the sixteenth and thirty-sixth sections in each township of said lands shall be reserved for State school purposes, in accordance with the provisions of the acts of admission of the State of Kansas: *Provided, however*, That nothing in this act shall be construed in any manner affecting any legal rights heretofore vested in any other party or parties."

Approved April 10, 1869.

This of course, as the court know, not only has the force of law, but *is a law*, and requires all the formalities of an act of Congress.

It was passed in view of the claim, then recently, and for the first time, made by these railroad companies to a land grant in the Osage lands. The debates

in Congress show that it was designed as a denial of any railroad grant.

The Representative in Congress from Kansas had asked the President to withhold the lands from public sale, so that the policy of the 4th article of the Osage treaty in favor of settlers might be carried out by act of Congress. The President had acceded to the request and revoked his proclamation of sale. It was under these circumstances that Congress deliberately passed this joint resolution, and upon the most mature consideration. It was approved by the President. It had the sanction of two of the great departments of the Government.

The Interior Department carried the joint resolution into effect and permitted entries of land by settlers, until more than two thousand heads of families entered and received duplicate receipts as evidence of title from the proper land office for $235{,}436\frac{58}{100}$ acres of land, on which are found now 2,295 homes.

While this was going on, no step was taken by any Railroad company to appeal to the courts in any form, or otherwise arrest the proceedings. Finally, the Secretary of the Interior, without deeming it necessary to take the opinion of the Attorney General, but declining to do so, in the discharge of what he deemed an imperative duty, commenced the work of setting aside entries made under the sanction of the Interior Department, and by officers under its supervision, and by authority of Congress, whose solemn law it is now proposed to set aside.

If the Government and the Railroad companies could be estopped by their own acts, these entries, as a matter of conscience and of right, and the homes made under them, could never be disturbed.

But if, in authorizing these sales, Congress was wrong, and if the Interior Department in making them was wrong, and if the Railroad companies either erred or did not err in interposing no legal restraint, and in "sleeping on" their rejected claim, and in acquiescing in its repudiation so far as they did, then this court will so determine.

We rest on the law, ask nothing else, and make no suggestion to disregard it in the least. But this it is deemed proper to say, in answer to the allegation that the settlers went upon these lands "with notice" of the railroad claims. But the joint resolution of April, 1869, under the circumstances, is of more than *persuasive weight* in construing the act of 1863.

This I proceed to show—

SECTION 1. *It is a clear repudiation of the railroad claim.*

THE FACTS:

The railroad grant, wherever it did exist, was of all the *odd*-numbered sections as lands granted, 'in place,' within ten miles on each side of the roads, and of indemnity sections to be selected outside of this and within twenty miles.

In the case of the Missouri, Kansas, and Texas Railroad Company, the indemnity selections were not limited to odd-numbered sections.

The claims of the two railroad companies, if held valid, therefore, sweep away nearly all these lands. Substantially none will be left either for settlers, under the joint resolution of 1869, or to be sold for cash, as required by the treaty.

This was so well understood that Judge Curtis, in his argument before the Secretary of the Interior on behalf of these Railroad companies, in December, 1871, said:

"It is of no consequence in this case whether both acts made a grant, or one of them; and if one, which one; because, as I understand it, in either case all the lands will be covered."

THE LAW:

Yet with full knowledge of this, Congress, by the joint resolution of 1869, declared—

"That *both* the *odd* and even-numbered sections of said lands shall be subject to settlement and sale."

Here was a clear, distinct, unequivocal denial of any railroad land grant in any of these lands.

a. If in any particular this may be supposed to conflict with the Osage treaty of 1865 as to the mode of disposing of the lands, it is a sufficient answer that it carries out the spirit of article 4, and does not defeat a single purpose of the treaty. And if this were not so, the Railroad companies have no right to object.

All Indian treaties which attempt to dispose of public lands are subject to the paramount authority of Congress, which has the exclusive power under the Constitution—

"To dispose of and make ALL needful rules and regulations respecting the territory and other property of the United States."

This subject was fully discussed in the argument in Holden *vs.* Joy, (17 Wallace, 211.)

Congress even has power to repeal a treaty.—(The Cherokee Tobacco, 11 Wallace, 621.)

And Congress certainly has power to prescribe by law the mode of executing the provisions of a treaty and of determining what are the "most advantageous terms" of selling the Osage lands "for cash."

The Osage treaty has been ratified by Congress in various forms, and so became obligatory to be executed in obedience to the joint resolution of April, 1869, and excluding by the ratification, any recognition of the railroad grant.

b. This joint resolution requiring a sale of these lands was *designed* as a denial of the asserted railroad grant, because it required a sale of all the lands except school lands and special treaty grants, and if the railroad grants took effect, there would be no odd-numbered sections to sell, and even the school sections would be swept away.

The joint resolution was designed as a denial of the railroad grant, because, it so explicitly declares that "both the *odd* and even-numbered sections" should be subject to sale.

This took the *odd sections* which the railroad companies claimed as lands granted *in place*, and the odd and *even sections* liable to selection as indemnity land. And if the Railroad companies had any rights, they were then *vested* as to odd sections granted *in place*, and as to both odd and even sections, their right to have selections of indemnity land made, for the lines of road had been definitely fixed.

c. But the evidence does not stop here.

On the same day that this joint resolution was passed, April 10, 1869, Congress passed the Indian appropriation act, (16 Stat., 39.)

By this act Congress appropriated $30,000 "for subsistence of the Great and Little Osage Indians, to be reimbursed from the proceeds of their lands in Kansas."

Congress intended that *these lands*, which the joint resolution of this day had required to be sold, should reimburse the $30,000 so advanced in addition to the $300,000 already advanced, and $20,000 as expenses of survey and sale. Not all of these sums could ever be reimbursed if these Railroad companies had, as they claim, grants covering nearly all of the lands. The treaty evidently designed that the $300,000 advanced in pursuance of its provisions should be reimbursed from the sales made in pursuance of the same article which made the advance—article one. But if the sales under the 4th article could be included, there were only 144 settlers taking 22,315$\frac{74}{100}$ acres, and paying only $27,894 67. So strong was the faith of Congress in their denial of the railroad grant, that $30,000 were risked on it in addition to the $300,000, and more previously advanced. There can be, therefore, not the slightest doubt of the purpose and opinion of Congress.

SECTION 2. *Congress did not even admit the possibility of any Railroad Company having any claim.*

The joint resolution of April 10, 1869, after authorizing a sale to bona fide settlers, with a proviso requiring a sale of both odd and even-numbered sections, adds two additional provisos, as follows:

"*And provided further*, That the sixteenth and thirty-sixth sections in each township of said lands shall be reserved for State school purposes, in accordance with the provisions of the acts of admission of the State of Kansas: *Provided, however*, That nothing in this act shall be construed in any manner affecting any legal rights heretofore vested in any other party or parties."

It has been urged that this latter proviso is a *saving of rights vested in the Railroad Companies.*

That it is *not so*, but has a *wholly different purpose*, is perfectly manifest, and results from the language of the resolution, its purpose, and from well-settled rules of construction.

1. It has already been shown that the *intention* of Congress, expressed in the joint resolution, was to authorize a sale to settlers of both *odd* and even-numbered sections, and this was a clear *denial* of any railroad grant.

Now, it is utterly impossible to believe that Congress intended in one sentence to deny the existence of a railroad grant, and in the next to admit the possibility of its existence. It is impossible to believe that Congress would, as the joint resolution did, give an assurance to settlers on these lands, and those who, within two years after its passage, might come on, that they should have a right to buy lands in the odd and even sections, and yet to notify them that there were "legal rights heretofore vested" in the same lands they were invited *to come on* and to buy.

Such a suggestion accuses Congress of intentional perfidy to vested rights.

It accuses Congress of a purpose to invite thousands

of settlers to expend their money in the purchase of lands, only to find themselves harrassed with litigation over prior vested rights. The court will not give a construction to this *proviso* which will impute such perfidy to vested rights, and such a purpose to entrap citizens into years of expensive litigation.

2. But another reason is found in the *words* of the *proviso*. It saves the "legal vested rights" of—whom? Of these Railroad companies? It does not say so. If Congress had intended to save any rights for them, it could have said so. If any friend of the companies in Congress had desired to make it plain that this was a saving of supposed or *possible* Railroad company rights, he would have asked Congress to save not only, as the joint resolution says, "legal rights heretofore vested in any other *party* or *parties*," but also in any other "corporation or company." But no one ventured this in the face of the purpose which Congress had already so clearly expressed, not to admit the *possibility* of a railroad grant.

These words, "any other party or parties," are not apt words to include a *corporation* for several reasons:

a. They do not, *per se*, when used in any connection other than in relation to causes in court, include a corporation.

This is clear upon authority.

In Pennsylvania Railroad Company *vs.* Canal Commissioners, (9 Harris, 21 Pa. Stat., 9–21,) the Railroad company claimed a right to run its cars over the Columbia railroad. The original act of incorporation did not authorize this. The Pennsylvania act of April

15, 1834, subsequent to the act of incorporation, provided that—

"*Individuals* shall have the right to place cars on the [Columbia] road under such rules and regulations as may be adopted, and attach their cars to the locomotive cars belonging to the Commonwealth for the purposes of transportation."

But the court held that, "as such privilege is withheld by its act of incorporation," the Railroad company is not authorized by the act of 1834 to use the Columbia road.

Chief Justice Black, in considering the question whether the word "individual" included the Railroad company, said:

"No signification of it can be large enough to include a company from which the privilege is withheld by the law which gives it existence and defines its powers."

Now, to apply this case here: As the joint resolutions explicitly denied the existence of a railroad grant, the terms "party or parties" cannot be construed "to include" the railroad companies in a saving of vested rights.

b. The *proviso* excludes corporations upon the maxim "*noscitur a sociis.*"

This rule has a specially forcible application in this case, for the joint resolution itself has given a construction to the terms "any other party or parties" as excluding any but *individual citizens.*

If this last *proviso* had been intended to apply to any other than individual citizens the preceding *proviso* would have been totally unnecessary.

This reserved "for State school purposes," sections 16 and 36, "in accordance with the provisions of the act of admission of the State of Kansas."

This act of admission had already vested these lands in the State.—(Act January 29, 1861, 12 Stat., 127, sec. 3.) And if the words "party or parties" could apply to any other than individual citizens they would have included the State, and the *proviso* as to school sections would have been totally unnecessary.—(Martin *vs.* State, 24 Texas, 61.)

As the words "party or parties" do not include the State, they cannot be held to include the less-favored Railroad companies. Reservations for school purposes are more important than grants for railroads.

Congress seems purposely to have avoided the use of the word "person," which under some circumstances might include a *corporation.*—(Sedgwick Stat., 2d ed., 372; 4 Cal., 304; 1 Bush, Ky., 250; 56 Barb., 46; 10 Wis., 351; 3 Brewst., 124.)

c. The proviso excludes corporations from its saving upon approved rules for construing *provisos.*

This court has said that—

"A *proviso in* deeds or *laws* is a limitation or *exception to* a grant made or *authority conferred*, the effect of which is to declare that the one shall not operate or the other be exercised unless in the case provided."—(Voorhes *vs.* Bank United States, 10 Peters, 449.)

This proviso cannot be enlarged in its operation in opposition to the limitations thereon imposed by its connection in the statute, and its own plain words. (United States *vs.* Dickson, 15 Peters, 165; Thornhill *vs.* Hall, 2 C. Clark & Finlay's House of Lords' Cases, 36.)

SECTION 3. *This proviso had a purpose without including a saving for any Railroad Company.*

The Osage treaty proclaimed January 21, 1867, gave lands to John Schœnmaker, in trust, for a Catholic mission; it gave lands to the heirs of Charles Mograin; it gave lands again to Schœnmaker to educate the children of the Indians; it gave lands to Darius Rogers, and in Article IV secured to "all loyal persons, being heads of families, &c., having made settlements * * * the privilege of buying a quarter section each," &c.

Under this article there were 144 settlers, taking each a quarter section of land—in all, $22{,}315\frac{74}{100}$ acres.

Then the fourteenth article provides for patents to issue to half breeds not to exceed twenty-five in number, for eighty acres each, and to Joseph Swiss, a half breed, one-half section.

There were at the date of the joint resolution settlers on these lands who had pre-emption claims, some inchoate, some partly perfected, at least by settlement, and the *proviso* was designed to affirm that no right of theirs should be lost and no settlement or claim made under the joint resolution to their prejudice.

Here was ample scope for the proviso to act upon. This was its purpose, to protect these rights.

And when a subject-matter is found *which satisfies the purpose of the proviso, it cannot be extended beyond its terms to find one not within its letter.*

It was not necessary to enumerate the *right of way* of the railroad company for several reasons, or to extend this proviso to save it.

a. It was already secure in a way to be notice to all the world by the act of March 3, 1863, and the subse-

quent Osage treaty, which gave this Railroad Company a right of way.—(Act March 3, 1863, sec. 1, 12 Stat., 771; Osage treaty, art. 11, 14 Stat., 689.)

This treaty secured the right of way to the Railroad companies in express terms. This express provision in their favor shows that when it was intended to give anything to the Railroad companies, they were specifically named. Nothing was left for inference. The maxim well applies, "*Expressio unius exclusio alterius.*"

It is impossible to believe that the treaty would in *express terms* secure a right of way, and leave an immense land grant to mere inference.

So the omission in the joint resolution to name the Railroad companies must be held to have been intentional, in view of this usage to leave none of their rights to inference.

b. It is never necessary to save a railroad right of way in making a sale of lands.

The law makes the reservation. Even in ordinary deeds of conveyance it does not fall within the covenants of warranty, though the grant be general and without reservation.

Patterson *vs.* Arthurs, 9 Watts Pa., 152.
Wilson *vs.* Cochran, 10 Wright Pa., 233.
Scribner *vs.* Holmes, 16 Indiana, 142.

And in Rawle on Covenants for Title it is said:

"It is settled that the covenants for title do not extend to the acts of the State in its exercise of sovereignty."

Dobbins *vs.* Brown, 2 Jones Pa., 80.
Bailey *vs.* Miltenberger, 7 Casey Pa., 41.
Dyer *vs.* Wightman, 14 P. F. Smith, 427.
Brimmer *vs.* Boston, 102 Mass., 19.

But if this last proviso was necessary to save the railroad right of way, as it was not, and if so held, and thus made one purpose of the *proviso*, it cannot for the reasons already given be construed a *saving* in recognition of a land grant.

SECTION 4. There can be, of course, no claim that the proviso to this joint resolution, *per se*, makes any grant, or vests any title in the railroad company or any person.

a. It does not profess to grant anything.

There is not one word in it that can be construed into a grant. Its *title* indicates no such purpose. It has but one purpose—*to enable settlers to purchase.* It is not even accompanied by the frequent expression, "and other purposes."

The title is proper to be considered to ascertain the purpose of an act in such case as this.—(Burget *vs.* Burget, 1 Ohio R., 469–480; Lafayette *vs.* Lewis, 7 Ohio, 86; 12 Ohio St. R., 171.)

That this makes no grant is so clear it cannot require further argument.

b. It ratifies nothing.

It does not profess to ratify any grant. If it had in express words admitted that a prior law or treaty had in terms undertaken to make grants, leaving them to stand on *their own* operative force, validity, or invalidity, then nothing could be taken under *such admission.* An admission that a void or ineffectual attempt has been made cannot give it validity or effect. But there is no such admission.

It admits nothing, it *vests* nothing, it *grants* nothing, it *validates* nothing, It only says, *if* there are vested rights, they are not disturbed.

In any view of the joint resolution, it is as a legislative construction of the act of 1863, strongly persuasive, if not conclusive, against the asserted grant in the Osage reservation.

SECTION 5. It has been said by Judge Curtis, in his argument before the Secretary of the Interior, in disparagement of the settlers under the joint resolution, that they "went on these lands with notice that they were withdrawn from sale, and did not constitute a part of the *public lands* of the country for purposes of settlement."

We agree with Judge Curtis that this Osage reservation never became "public lands" of the United States, but has been in part sold in execution of the purpose of the Osage treaty for the benefit of the Indians. The case of Holden *vs.* Joy, (17 Wallace, 211,) proves that lands thus required to be sold by treaty do not become "public lands." Judge Curtis in that case so argued, and so the court in effect held.

But the settlers knew that the lands "were withdrawn from sale," it is said!

They *were* so withdrawn from sale by the letter of the Commissioner of the General Land Office of January 21, 1868, received by the register of the proper local land office February 4, 1868. This was after Secretary Browning had overruled the decision of the Commissioner of the General Land Office, and in obedience to his ruling. But *he*, in turn, was overruled by the President's proclamation of sale, and then by Congress in

the joint resolution of April 10, 1869, and then by the President's approval of it, and then by the Secretary of the Interior, in selling these lands.

These were the "notices" the settlers had. These were the invitations on which they acted and paid their money, which the Government now has in its treasury, unless paid out for its officers, or for interest on the public debt, or otherwise.

And, after this solemn resolve of Congress, and with these notices to the Railroad Company, and to the Farmers' Loan and Trust Company, a mortgage is made July 1, 1869, which does *not* name these lands, but does name generally all the property of the Company, which must be presumed to be sufficient to secure the bonds it protects.

And now this mortgage is solemnly thrust into this case, though it cannot affect any legal question in it.

So far as the United States now may seek to enjoin the mortgagee from asserting any claim on these lands, the Farmers' Loan and Trust Company is a proper party.

But any appeal to the court to assert a railroad grant by reason of this, would be an indignity alike offensive and indecent.

This mortgage was given before the Railroad Company had completed any road through the Osage lands. The mortgagee was bound in law to know, and did know it took no rights in them—none was given in law; none was earned. Patents issued without authority of law are void and can be collaterally impeached, as has been already shown. The mortgagee "cannot claim the advantages conceded by the law to a *bona fide* pur-

chaser, without notice of the legal title, for a valuable consideration actually paid."—12 Wallace, 388; Nace *vs.* Boyer, 30 Penn., 110; Boone *vs.* Chiles, 10 Peters, 117–211.)

DIVISION II.

The joint resolution of April 10, 1869, *is to be regarded as conclusive against the claim of a railroad land grant.*

The principal arguments on behalf of the railroad companies, in the various stages of their claim, up to this court, have conceded that, *without the aid of the Osage treaty, proclaimed January* 21, 1867, *no grant* could be claimed. They all assume that the treaty extinguished the Indian title, and that, *without this*, no railroad grant could be claimed.

In the argument of February, 1870, before the Secretary of the Interior, the counsel of the Missouri, Kansas, and Texas Railroad Company said:

"The grants attached in these ceded lands by virtue of the treaty, and *not by force of the acts of Congress.*"

In December, 1871, Judge Curtis, in his argument before the Secretary, said:

"It was only when the location was filed that this grant began to operate upon any particular land. Now, when that location was filed, this Osage title had been extinguished."

And Judge Thatcher said:

"The grant did not operate until the road was located, and then only on such land as *then* appeared to be unappropriated by the Government. It is admitted that when this location took place, these Osage ceded lands *had lost their Indian title and character.* From thenceforth they are treated as public lands by the Government."

Secretary Browning, in his opinion of 1868, said:

"Had the [first] article of the Osage treaty been silent touching a sale of the ceded lands, *they would, on becoming a part of the public domain, have been subject to the legislation disposing of it.*"

In all these it is conceded that if the treaty had not been made, and if the treaty of 1825 had been left in force, no railroad grant could have been claimed.

I do not agree at all that the Indian title was extinguished by the treaty; the lands were conveyed to the United States "*to be sold for cash.*" The treaty was in fact a *contract.*—(Sedgwick Stat., 386, 2d ed.)

I do not agree that any right of the Railroad Company attached when the road was located which would not equally well have attached upon an earlier location.

But conceding, only for the present and for the sake of the argument, what has been claimed, the whole railroad claim rests *on the effect to be given to the treaty of* 1867.

Now, Congress by the joint resolution of 1869 declared the effect of the treaty—gave it a construction adverse to the railroad companies.

This is conclusive in this court. Sedgwick says:

"A treaty is in many cases merely a contract, and not a legislative act; *in cases of this kind it addresses itself to the political not to the judicial department, and the legislature* must execute the contract before it can become a rule for the court. But there are many cases where a treaty is to be regarded not as a *contract* but as a *rule*, and in these cases it has the effect of an act of the legislature.

"It is important to notice the rule that *in the construction of this class of documents the judiciary, in one respect, do not occupy the same position nor hold the same language that they do in regard to other matter, of written law.*

Whenever the nation, by its properly constituted agents, has declared its interpretation of a treaty that interpretation becomes binding on the courts.

"The Supreme Court of the United States has said: 'However individual judges might construe a treaty *it is the duty of the court to conform itself to the will of the legislature*, if that will has been clearly expressed; the courts cannot pronounce the course of their own nation erroneous.'"—(Foster *vs.* Neilson, 2 Peters, 253–307; Sedgwick Const. Stat., 2d ed., 386.)

There is a manifest necessity for this. A treaty does not, like an ordinary act of Congress, concern merely our own citizens, but there are other parties to it. The Osage Indians, once a powerful and warlike nation, and even now not to be treated without respect, have an interest in this treaty. Its violation may bring war. The duty to construe the treaty rests with Congress, so as to carry out in good faith its provisions. If courts, or subordinate executive officers, can interpose to defeat the purpose of treaties against the wishes of Congress declared in law, approved by the President, then the issues of war and peace, and all our foreign relations, are taken from the political departments and transferred to the courts. The mode of construing and executing treaties is *political in its nature*—not judicial.

The courts can no more control the political power than Congress can usurp the judicial functions.

This court has expressly disclaimed any right to pass upon political questions.—(Georgia *vs.* Stanton, 6 Wallace, 50; Grossmeyer *vs.* U. S., 4; N. & H., 1; The Protector, 12 Wallace, 700; U. S. *vs.* Fifteen Hundred Bales, &c., 15 Int. Rev. Rec., 137; Van Antwerp *vs.* Hulburd, 7 Bl. C. C., 426; U. S. *vs.* Baker, 5 Bl. C. C., 6; Mississippi *vs.* Johnson, 4 Wallace, 475.)

The political power exercised in treaties is so great that they may annul State laws, and even destroy vested rights.

Sedgwick says:

"It has been insisted that the Federal Government had no power to make a treaty that could operate to annul a legislative act of any of the States, or to destroy vested rights, but the contrary has been expressly decided."—(Sedgwick Stat., 2d ed., 385; Ware *vs.* Hylton, 3 Dallas, 236; Denu, &c., *vs.* Harnden, 1 Paine, C. C., 54; U. S. *vs.* Schooner, 1 Cranch, 109.)

By the Osage treaty, the Indians say, we,

"Having more lands than are necessary for our occupation, and all payments from the Government under former treaties having ceased, and we being greatly impoverished and desirous of improving our condition by disposing of our surplus lands, do hereby grant lands to the United States," &c.

And in the same article the United States say, in consideration of this, we agree that—

"Said lands shall be surveyed and sold under the direction of the Secretary of the Interior on the most advantageous terms for cash, as public lands are surveyed and sold," &c.

Here is a *contract.* It is the duty of Congress to execute it. Congress did so in part by the joint resolution of April, 1869. The Indians made no objection to that mode. In such case as this the court has no power to disregard the interpretation put on the treaty by the joint resolution.

In Foster & Elam *vs.* Neilson, (2 Peters, 253,) Chief Justice Marshall said:

"When the terms of the stipulation [of a treaty] import a contract, when either of the parties *engage*

to perform a particular act, the treaty addresses itself to the political, not the judicial department, and *the legislature* must execute the contract before it can become a rule for the court."

Here, then, in the joint resolution of April, 1869, Congress has construed the act of March 3, 1863, *in a form which could even divest a former railroad grant, if one had been* MADE, and has in part executed the treaty, and by the Indian appropriation act, (16 Stat., 39,) of the same date with the joint resolution, advanced $30,000 to the Indians in aid of the execution.

The joint resolution was a repeal of the treaty as to the lands, if it had a purpose even to direct a mode of sale. Congress could repeal it.—(Cherokee Tobacco, 11 Wallace, 616; Ropes *vs.* Clinch, 8 Bl. C. C., 304.) The act of August 4, 1854, (1 Lester, 238,) repealed the act of June 29, 1854, (1 Lester, 226,) granting land to Minnesota for railroads. If the Osage treaty had made a land grant it never was accepted by the railroad companies. No right in any lands was vested. The joint resolution in fact was declaratory of the effect of the treaty, and required a sale of all the Osage lands.

In Webster *vs.* Reid, Morris (Iowa) R., 467, the court held that the judiciary cannot interpose to arrest the power of Congress in executing treaties.

Upon the authorities cited, the court cannot go back of this determination by Congress, and it is conclusive against any claim of a grant in aid of a railroad.

PART V.

THE "THAYER ACT."

The act of Congress of April 19, 1871, does not aid the claim of a land grant.

The town of Thayer is in Neosho county, about twenty miles south of the north line of the Osage ceded lands, and within their boundaries.

In April, 1870, the Leavenworth, Lawrence, and Galveston Railroad Company had constructed its road southward as far as Thayer. It seems it became desirable to change the previously located route of the road south of Thayer, and in January, 1871, a concurrent resolution was adopted by the Legislature of Kansas, asking Congress to allow a relocation of the road.

In pursuance of this, Congress passed an act approved April 19, 1871, as follows:

"AN ACT to enable the Leavenworth, Lawrence, and Galveston Railroad Company to relocate a portion of its road.

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the Leavenworth, Lawrence, and Galveston Railroad Company, for the *purpose of improving its route and accommodating the country*, may relocate any portion of its road south of the town of Thayer, within the limits of its grant, as prescribed by the act of Congress entitled 'An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State,' approved March third, eighteen hundred and sixty-three, *but not thereby to change, enlarge or diminish said land grant.*

"Approved April 10, 1871."—(17 Stat., 5.)

1. *No new grant.*

No one as yet has ventured to claim that this *makes* or was *designed to make* any *grant.*

It is perfectly clear it makes no grant. This was no part of its purpose. It did not enter into the legislative *intent*, and this is the controlling element in the intepretation and construction of statutes.

The title of the act can properly be considered to ascertain the intention of Congress.

And this shows that the act had but *one purpose*—"to enable the Railroad Company to relocate a portion of its road." It is not for this, "and other purposes," as the titles of laws so often declare. But the body of the act is equally explicit. The *sole* purpose of the Railroad Company in procuring the act was "for the *purpose* of improving its route and accommodating the country."

This, then, was the *sole* purpose of Congress.

But to place the purpose of Congress beyond cavil, and to exclude the idea of any new grant, the act, after authorizing a relocation of the road, concludes by saying "but *not* thereby to change, *enlarge*, or diminish said land grant."

2. *Not a "recognition" of a grant.*

The act does say that the Railroad Company "may relocate any portion of its road south of the town of Thayer, *within the limits of its grant*, as prescribed by the act Congress" of March 3, 1863.

There is not the slightest evidence that any grant was ever claimed in the Osage reservation until early in 1867, when the application therefor was rejected at the General Land Office, and repudiated still later by

the President's proclamation for a public sale under the treaty proclaimed January 21, 1867.

Settlers had gone on these lands because they were understood to be exempt from any railroad grant.

The fourth article of the treaty made provision for them in these words:

"ARTICLE IV. All loyal persons, being heads of families and citizens of the United States, or members of any tribe at peace with the United States, having made settlements and improvements as provided by the pre-emption laws of the United States, and now residing on the lands provided to be sold by the United States, in trust for said tribe, as well as [upon] the said lands herein granted and sold to the United States, shall have the privilege, at any time within one year after the ratification of this treaty, of buying a quarter section each, at one dollar and twenty-five cents per acre; such quarter section to be selected according to the legal subdivision of surveys, and to include, as far as practicable, the improvements of the settler."

The proclamation of sale was withdrawn after the application of April 2, 1868, of Hon. Sidney Clark, the Representative in Congress from Kansas, "on behalf of the settlers."

And the joint resolution of April 10, 1869, required a sale to settlers of odd and even sections.

But by this time the Railroad Company was making a claim.

And when the "Thayer act" was passed in April, 1871, it is possible some friend of the company may have caused to be inserted in it the mistake of "Thayer within the limits of its grant," but it is equally certain that Congress *intended to disclaim* any recognition of a grant; and for this purpose the act, after authorizing a relocation of the road, concludes with the words, "but

not thereby to change, *enlarge*, or diminish said land grant." Its *purpose* was not to recognize or construe the act of 1863.

3. *A recognition is not a grant, and does not aid or enlarge a real grant.*

When this subject was discussed before the Secretary of the Interior, in December, 1871, Judge Curtis made on it the single remark, that Congress, by the "Thayer act," "has explicitly acknowledged the validity of the grant."

The other learned counsel, in a very able argument, seemed to give it more importance by saying "this legislative *recognition* of the construction" of the act of 1863, contended for by the Railroad Company, "is not only of the highest value as showing the congressional intent," but he insisted that "the court, if possible, must give the statute such a construction as will enable it to take effect."

Here are two different principles announced.

As to the first of these—that a legislative recognition is of the highest value—it is by no means correct, either on *reason* or *authority*.

a. On reason.

By every principle of the plainest reason, a recognition or admission of that as a fact, which is not a fact, cannot make it so; to admit as true that which is not, and cannot be true, cannot make error truth.

The error, at most, can only prove that somebody wrote the act who did not understand the subject, or that it may have been written by some one eager to give countenance to a claim which stood sadly in need

of some respectable recognition. There is a reason for giving no significance to this recognition, found in the fact that such bills are generally drawn by the parties seeking privileges under them.

This court, in 23 Howard, 88, said:

"We concur with the following citation and reasoning of the plaintiff's counsel, to wit, Lord Ellenborough in his judgment in Geldart *vs.* Gladstone, (1 East., 675:) 'If the words would admit of different meaning, it would be right to adopt that which is more favorable to the interests of the public, and against that of the company,' &c. The reason of the above rule is obvious: *parties seeking grants for private purposes ususally draw the bills making them.* If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language, for the purpose of taking, by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms."

But that which has no life is not made alive by falsely declaring it so.

b. On authority.

A recognition is not of the "highest value," and, in fact, will generally only be regarded as entitled to some respect; but if the circumstances, as here, show that it arose from want of correct information, or must have been an attempt by indirection to obtain a covert recognition, it is of no value at all.

The authorities are clear.

In Pennsylvania Railroad Company *vs.* Canal Commissioners, (9 Harris, 21 Pa. St., 9–21,) a question was made as to the right, claimed by the railroad company,

of "transporting passengers and tonnage over the Columbia railroad." This right was claimed under an act supplementary to the charter, which declared that it was a part of their original charter power to transport "passengers and tonnage over their own and the Columbia railroad."

But Chief Justice Black, delivering the opinion of the court, said:

"A supplement to the charter of the Pennsylvania Railroad Company was passed on the 23d April, 1852, by which it was authorized to purchase and hold certain real estate in the county of Philadelphia 'for such objects as appertain to the legitimate business of the company, *authorized by their act of incorporation*, of transporting passengers and tonnage over their own *and the Columbia railroad.*'"

"The simple and manifest object of this supplement was to give the company the power to hold the land for the purposes of the business which the charter authorized it to carry on, and to confine its future operations within the bounds previously fixed. But in the overflowing redundancy of expression which usually characterizes our statutes, *the legitimate business of the company was not described according to the truth.* The legislature, or a majority of its members, *probably supposed that the charter did authorize the company to engage in the business of transporting passengers and tonnage on the Columbia Railroad* as well as on their own. *But an error is not converted into a truth by the mere recital of it in an act of assembly. That which has not been law heretofore must be* ENACTED *to make it law hereafter.* We obey the will of the legislature when expressed as its will according to the forms of the Constitution, *but its opinions are not binding.* Such opinions are often entitled to great respect as evidence of the law in doubtful questions; but *when they are manifestly founded in mistake they are to be disregarded* like an erroneous decision of the judiciary. * * * No privilege is granted unless it be expressed in plain and

unequivocal words testifying the intention of the legislature in a manner too plain to be misunderstood."

This is a much stronger case to claim a grant of corporate power, than is the one now before the court to claim a grant of land. But the supreme court of Pennsylvania repudiated the act in question as having any value by way of "recognition," and held it had no force as a grant.

In fact, it is the business of courts to construe laws, and of Congress to make them.

I call attention to another case: Bingham *vs.* Supervisors of Winona County, 8 Minnesota, 448.

This was an action by a county treasurer to recover certain fees for making out certificates of purchase at a sale of lands for taxes. But it was insisted the statute did not apply to the treasurer, but only to the sheriff.

For the treasurer it was urged that the "legislature had given a construction" to the section of the statute under which he claimed by a subsequent statute providing for the repeal of the section, as follows:

"So much of chapter 9, section 94, of the public statutes, as authorizes the payment of 75 cents for such certificates, is hereby repealed."

But the court said:

"If the repeal of the statute named is to be regarded a construction of that legislature to the effect that the statute was then in force, and that by virtue of it the treasurer was entitled to the fee therein named, this fact could by no means have the conclusive effect claimed for it by the counsel for the appellant. It is only the intent of the legislature which enacts the statute that is to govern the courts in the construction thereof. *The opinion of a subsequent legislature upon the meaning of a statute, is entitled to no more weight than that of the same men in a private capacity.*"

In Dash *vs.* Van Kleck, (7 Johnson, 508,) the court held that the legislature could not usurp the judicial function of interpreting laws, and declared that this power "does and ought to belong *exclusively* to the courts of justice."

"In that case, the question came up *whether a certain act was in force at a certain date.* To show that it *was* in force at the date in question, one of the counsel cited a subsequent act *repealing it*, and argued that the repealing act was a legislative recognition that it was in force up to that time, or else it could not be *repealed.*"

Kent, Chief Justice, said—

"It is equally admissible to consider the act as declaring how the former statutes were to be construed as to cases already existing. If this interpretation was to be considered as giving the former acts a new meaning, it then becomes a new rule, and is to have the same effect as any other newly-created statute. But if it be considered as an exposition of the former acts for the information and government of the courts in the decision of causes before them, it would then be taking cognizance of a judicial question. This could not possibly have been the meaning of the other act, for the power that makes is not the power to construe a law. It is a well settled axiom, that the union of these two powers is tyranny. Theorists and practical statesmen concur in this opinion. Our Government, like all the other free governments upon this continent, and like the only free government, at present, remaining in Europe, consists of departments, and contains a marked separation of the legislative and judicial powers. The constitutions of several of the United States, and among others, those of Massachusetts and Virginia, have an express provision that the legislative and judicial powers shall be preserved separate and distinct, so that one department shall not exercise the functions belonging to that of the other. Most of the models of a free and limited constitution which were produced in Europe, under the impulse of the late revolution, and

which had any pretentions to skill or wisdom, and particularly the new constitution of Poland and France, in 1791, and of France, in 1795, contained the same provision, in language more or less explicit. And if it be not found in our own constitution, in terms, it exists there in substance, in the organization and distribution of the powers of the departments, and in the declaration that the 'supreme legislative power' shall be vested in the Senate and Assembly. No maxim has been more universally received and cherished as a vital principle of freedom. And without having recourse to the authority of elementary writers, or to the popular conventions of Europe, we have a most commanding authority in the sense of the American people, that *the right to interpret laws does, and ought to, belong exclusively to the courts of justice.*

"For these reasons, I consider that the case before the court ought to be decided precisely as if the act of the 5th of last April had not been passed."

In Postmaster General *vs.* Early, (12 Wheaton, 148,) the court, in discussing the "operation of a legislative enactment having the effect of a declaratory act," say, that "a mistaken opinion of the legislature concerning the law does not make law."

Pike *vs.* Megoun, 44 Missouri, 491.

Sedgwick on Construction of Stat., (2d ed.,) 227.

From all this it is clear that the "Thayer act" is of no value in determining the existence of a grant.

But there may be recognitions of the true construction of an act of Congress before and after its passage which may be of value, when they come from the sources authorized to shape a policy and execute the laws from a disinterested and judicial stand-point.

Of this character many have been already cited:

1. The authority of 5 Opinions, 578, which preceded the act of 1863, and declared in advance that

the effect of its provisions would be not to make a grant in the Indian reservation.

2. The act of June 30, 1834, (4 Stat., 729, sec. 11,) and of January 9, 1837, (5 Stat., 135,) which stand as unrepealed statutes, along with the act of 1863, all *in pare materia* declaring a purpose that Indian reservations should not pass by land-grant acts, but should be devoted to the benefit of the Indians.

3. The authority of 5 Opinions, 603, which held the same doctrine as to the Chickasaw country.

4. The whole policy of all the Indian treaties.

5. The defeated treaty of May 27, 1868, as to the Osage diminished reserve, and the act of Congress of July 15, 1870, (16 Stat., 362, sec. 12,) affirming the same policy.

6. The authority of this court, saying, in advance of the act of 1863, that a grant did not cover lands reserved at its date.—(13 Peters, 498; 11 Wisconsin, 262.)

7. The ruling of the Commissioner of the General Land Office of April 26 and May 17, 1867, when the subject was fresh and well understood.

[On page 35 of this brief there is a typographical error as to the date of Whitney's application. It should read "1867, April 18," instead of "1866."]

8. The subsequent Presidential proclamation for a sale for the benefit of the Indians under the treaty proclaimed January 21, 1867, all the lands and repudiating the railroad claim.

9. The construction made by Congress in the joint resolution of April 10, 1869, for the sale of the lands,

both odd and even sections, to settlers, who, in pursuance of it, purchased, without objection from the Railroad Companies or from any source, but upon the invitation of the Government, land for which they paid money into the treasury, which will be swept away from them, and the lands swept away from the settlers, if the Railroad Companies succeed in defeating these sales.

10. The construction made by the 9th section of the act of July 26, 1866, (14 Stat., 289,) showing that a grant does not operate on Indian reservations unless expressly so said.

11. The Osage treaty proclaimed January 21, 1867, requiring a sale of all these lands, and in Article IV and other articles making provisions utterly inconsistent with any grant for a railroad.

Others still might be named, but without adding to the list, I will say—

12. Last, "but not least," is the long delay of this Railroad Company to assert any claim; and the fact that no two men have ever yet been able to agree on any ground on which to *base* the railroad claim.

Each of the two Railroad Companies now claiming these lands has proved in the argument before the Secretary of the Interior in 1870, that the other has no grant. And besides this, the Missouri, Kansas, and Texas Railroad Company has expressly conceded it had no grant in the Osage lands by the map No. 3 filed in the case of the Missouri, Kansas, and Texas Railroad Company *vs.* The United States.

Secretary Browning said, in effect, in his opinion of 1868, that the act of 1863 made no grant; that if the treaty had "been silent touching a sale of the ceded

lands they would, on becoming a part of the public domain, have been subject to the legislation of Congress."

And then resting the railroad claim solely on the "Senate amendment" of the treaty, while Assistant Attorney General Smith, differing with Secretary Browning, says, "in my opinion, the act of 1863 does make a grant," but declaring, at the same time, "the treaty was not intended to create, and in my opinion did not create, the grant."

Out of this "confusion worse confounded," in the face of a rule which says that if there be "*any* doubt from any obscurity of the act of Congress," the grant must fail, the court is asked to believe that a grant has been made.

——— *Nil fuit unquam*
Sic impar sibi.

Here are constructions of the act of 1863—judicial, executive, legislative, more than *Apostolic* in number, with none to betray them.

Only three men outside of these Railroad Companies have ever been found to dispute these constructions. These were Secretary Browning, just before retiring from office, the present Secretary of the Interior, and Assistant Attorney General Smith.

The deserved name and fame of these gentlemen cannot outweigh the array of authorities cited.

It has been said, as to the Thayer act, that "the court, if possible, must give the statute such a construction as will enable it to take effect."

This the court will do—that is, to make it take effect *as to its purpose.*

Its purpose was to authorize a *relocation of the road.* In doing this, as *mere matter of description*, Thayer was described as within the grant. This is a mistake. This false description may be rejected to carry out the purpose of the act in accordance with the maxim: "*Falsa demonstratio non nocet cum de corpore constat.*" (6 T. R., 676; Broom's Maxims, 269; Bacon Max. Reg., 25; 1 Greenleaf Ev., sec. 301.)

There is no rule of law which requires the court to give effect to the false description. The rule is exactly the other way. It is the duty of the court to *reject it.*

Greenleaf, in discussing the rule here applicable, says: "*So much of the description as is false is rejected*, and the instrument will take effect if a sufficient description remains to ascertain its application."

PART VI.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1874.

THE MISSOURI, KANSAS, AND TEXAS RAILROAD COMPANY, *Appellant*, *vs.* THE UNITED STATES. } No. 763.

This case involves substantially the same questions as the case of THE LEAVENWORTH, LAWRENCE, AND GALVESTON RAILROAD COMPANY, *Appellant*, *vs.* THE UNITED STATES, No. 676, and is submitted with it. Most of the facts are sufficiently stated in connection with that case.

This case was decided at the June term, 1874, of the circuit court of the United States for the district of

Kansas, and a decree made in favor of the United States, from which the Railroad Company appealed to this court.

The map of the definite location of the line of the Union Pacific Railroad Company, southern branch, (now Missouri, Kansas, and Texas Company,) from Junction City to the northern boundary of the Osage lands, was filed with the Secretary of the Interior November 26, 1866. A statement of the president and attorney of the company filed with it, "declaratory of the purposes for which the said company presented and filed said map," shows that the company claimed—

"All the grants for the construction of a railroad, on any part of said line, made to the State of Kansas by the acts of Congress approved March 3, 1863, and July 1, 1864, said lands having been assigned to it by the Atchison, Topeka, and Santa Fé Railroad Company, to which they were granted by the State by an act approved February 9, 1864, accepting said grants, and that we also claim all the lands granted to the State of of Kansas for the Union Pacific Railway (southern branch) Company by the act of Congress approved July 26, 1866."

The Missouri, Kansas, and Texas Railroad Company asserts a claim to a portion of the land by the act of March 3, 1863, and a contract with the Atchison, Topeka, and Santa Fé Railroad Company, dated March 19, 1866, approved by the legislature of Kansas February 26, 1867.—(Statutes of Kansas, of 1867, page 180.) This contract is alleged to be an assignment of the Atchison, Topeka, and Santa Fé Railroad Company to the Union Pacific Railway Company, southern branch, of all the right, title, interest, &c., held, acquired, and enjoyed for constructing, maintaining, operating, and enjoying

a railroad from a point on the Union Pacific Railway, eastern division, at or near Fort Riley, down the Neosho valley to where the Leavenworth, Lawrence, and Fort Gibson Railroad (now the Leavenworth, Lawrence, and Galveston Railroad) may intersect the Neosho valley.

"This is at the town of Humboldt, which is on the Neosho river, and the Leavenworth, Lawrence, and Galveston Railroad passes through Humboldt. The map No. 5 in evidence shows that the southern branch railroad was located, and the land granted under the act of 1863 for its construction was reserved along the line of the road from Council Grove to Humboldt as early as the 5th of May, 1863, when instructions, dated 19th of March, 1863, withdrawing the land in the Green limits, on the map No. 5, was received at the local land office The map No. 3 in evidence, and certified by G. M. Walker, chief engineer of the Union Pacific Railway, southern branch, and dated the 17th of November, 1866, shows the location of the southern branch from at or near Fort Riley to the northern boundary of the *Osage Indian reservation* near *Humboldt.* The certificate attached to this same map, of Andrew Aiken, president, and dated November 17, 1866, shows in connection with the public surveys the actually surveyed line of route of the Union Pacific Railway, southern branch, from Junction City, near Fort Riley, to the northern boundary line of the *Osage Indian reservation*, at or near the town of Humboldt, as per affidavit of the chief engineer of the said railroad, as definitely fixed in compliance with the act of Congress of March 3, 1863, and in pursuance of the resolution of the board of directors of said railroad company, passed August 10, 1866, and that the dates of the field-book thereof are truly indicated along the line from station to station upon this map."

"Now, these maps show that the southern branch never claimed any land under the act of 1863 south of the point of junction with the Leavenworth, Lawrence, and Galveston Railroad at or near the town of Humboldt, which, as is shown on the map No. 3, is north of the Osage Indian reserve; all north of this point of

junction to Fort Riley the road has been located, the land along the line withdrawn from sale from Council Grove down to Humboldt as early as May, 1863, and the Missouri, Kansas, and Texas Railway has received this land, and no one questions its right. But this exhausts their right to a grant of land under the act of 1863, and they are bound by their own location and claim, as evidenced by these maps."

"It is worthy of remark that *in the certificate to map No. 3*, (1866,) *these Osage lands are recognized by the officers of the railroad, as well as by the Governor of the State of Kansas as the Osage Indian reserve*. It is *so called in the certificates, and no claim is set up at this time to any portion of any of the Osage Indian reserve.* The plat of the land claimed by the road ends at the northern boundary of this Indian reserve. The idea of claiming any part of this reserve is evidently an *afterthought.* If the Missouri, Kansas, and Texas Railway can have any claim to a grant of land in the Osage Indian reserve, it must be by virtue of the act of Congress passed July 26, 1866, and no other.—(14 Stat., 289.) The map No. 4 in evidence, with the certificate of N. S. Goss, president, and G. M. Walker, chief engineer, is verified by the chief engineer on December 24, 1867, and is certified by the president and engineer on the 25th of the same month, and shows a *location of the route of the railroad from the northern boundary of the Osage Indian reserve to the southern boundary of the State, and purports to be with the view of claiming the benefit of the act of Congress of July* 26, 1866."

The following report of this case, as decided in the circuit court, from the St. Louis Central Law Journal of August 27, 1874, and which follows the report of the case No. 676, (the opinion in which is found in the record of the case,) presents all that seems to be necessary:

"*Land grant to aid railways—Indian reservation—treaty with Osage Indians construed.*

"THE UNITED STATES OF AMERICA *vs.* THE MISSOURI, KANSAS, AND TEXAS RAILWAY COMPANY.

"Circuit court of the United States, District of Kansas, June term, 1874.

"Before MILLER and DILLON, JJ.

"For reasons similar to those in the case of the United States *vs.* The Leavenworth, Lawrence, and Galveston Railroad Company, (*supra*,) the lands reserved for the benefit of the Osage Indians did not pass, under the land grant of Congress, to the State, to aid in the building of railways, approved July 26, 1866.

"The facts in the case appear in the case of the same plaintiff against the Leavenworth, Lawrence, and Galveston Railroad Company, *supra*.

"George R. Peck, district attorney, Wilson Shannon, and McComas & McKeighan, for the United States; T. C. Sears for the defendant.

"Mr. Justice MILLER: This case differs from that of the same plaintiff against the Leavenworth, Lawrence, and Galveston Railroad Company, in this: that the act of Congress which is the foundation of defendant's claim to the lands in controversy, was passed July 26, 1866.

"The significance of this difference in the dates of the grants is found in the assertion of defendants that the lands in question had then been ceded, by the treaty which we have discussed in that case, to the United States.

"It is hence argued that, as the United States had then the title to these lands, unincumbered by the Indian right of occupancy, there is no reason to suppose they were not included in the general granting clause, or that they were reserved within the meaning of the excepting clause.

"It will be perceived by looking at the date of the act of Congress, and the dates of the respective stages

of the treaty, that the treaty had passed the Senate, but with material amendments, June 26, 1866, one month before the approval of this bill by the President. But it had then to be submitted to the Indians for their action on these amendments Their approval was given September 21, 1866, two months after the passage of the act of Congress, and the treaty only became valid and operative by the proclamation of the President of January 21, 1867.

"There was, therefore, no valid subsisting treaty by which the Indian title to these lands was extinguished when the act of July 26, 1866, became a law.

"But if the treaty had been fully ratified at the date of the passage of the act under which defendants claim, that treaty was, itself, as much a reservation of these lands, within the meaning of the excepting proviso, as the treaty of 1825 was in the case we have before considered. It directed a sale of *all* these lands. It disposed of *all* the proceeds of the sale, and, by a necessary implication in appropriating them to other purposes, they were reserved for these purposes.

"The amendment to the treaty which we have considered, as it regards the other case, can have no application to the act of July 26, 1866, because by its express terms it is limited to existing laws. The amendment had been acted on, and passed from the control of the Senate, a month before this bill became a law. It was not an existing law when the amendment was proposed and adopted, and the amendment, therefore, had no reference to it.

"The argument that the bill and the treaty must both be considered as pending at the same time, and therefore construed with reference to each other, is not, in my judgment, entitled to much weight. If it had been the intention of the *Senate*, in making the treaty, to have consented or contracted that the bill which was then pending, and which might, or might not, become a law granting lands to the State of Kansas, should include these lands, they would certainly have used language that looked to that purpose. Their language has reference only to grants already made, to existing laws.

"So, if *Congress* had intended to grant these lands, knowing that a treaty for their cession was then under consideration in the Senate, which, by its provisions, appropriated the lands and proceeds of their sale to other purposes, they surely would have used some language to specifically include these lands, or at least to take them out of the excepting clause.

"A decree similar to that in the other case must be entered.

"DILLON, circuit judge: I concur.

"Decree accordingly."

CONCLUSION.

It only remains to offer an apology for the great length of this brief.

These cases *directly* involve the title to the odd-numbered sections of land within ten miles on each side of the two railroads through the Osage ceded lands.

On the decision of this question, however, depends the further claim of the Railroad companies to all the lands outside of the ten miles as indemnity, and to indemnity lands within the overlapping claims.

The ceded lands are about fifty miles long by thirty wide, and (excluding lands granted by or in pursuance of the treaty to sundry individuals) embrace about 960,000 acres, including the counties of Neosho and Labette, and part of Bourbon, Crawford, Allen, Wilson, and Montgomery, in the State of Kansas.

All of this is involved in the controversy, except perhaps a portion of the even-numbered sections within the ten miles on each side of the roads.

Here, then, are lands in extent and value probably equal to, if not greater, than were ever involved in any

one case in this court. More homes, perhaps, depend upon the result than in any case heretofore in this court. This will not affect the judgment of the court, but it may be an apology for the length of this argument.

If some of the principles contended for by the Railroad companies should be sustained, the titles to millions of acres of valuable lands will be annulled, and widespread ruin and consternation be wrought. On such issues as these, as I respectfully submit, it would be inexcusable to omit any fair examination of the many points that arise, and even some repetition believed to be appropriate under different heads may be permitted.

WM. LAWRENCE,
Of Counsel for Settlers

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ERRATA.

1. Page 34: The correct number of settlers under 4th article of treaty, 144—taking 22,315 $\frac{74}{100}$ acres of land, and paying therefor $27,894 67.—(See pp. 194, 199.)

2. Page 35, line 1, for "1866" read "1867."

3. Page 40: The correct number of settlers who perfected entries, 2,295; lands so entered, 235,436 $\frac{58}{100}$ acres—money paid therefor, $292,545 72.—(See p. 163.)

4. On page 82 read "2d Wheaton."

Memorandum as to Forfeiture.

By a decision of the Commissioner of the General Land Office, made October 8, 1874, the right of the Leavenworth, Lawrence, and Galveston Railroad Company to indemnity lands was declared forfeited, and the Company waived the right of appeal.

Even if a railroad land grant was intended to be made, there is ground for denying the right of the Railroad Company *to any land*, and this opens up the whole question of the division of the lands between the two companies, and would require new pleadings, evidence, and proceedings.—(2 Dillon, C. C., R. 398; Schulenberg *vs.* Harriman, Supreme Court U. S., decided October term, 1874; Opinion Attorney General, August 6, 1874.)

Supreme Court United States.

LEAVENWORTH, L. & G. R. R.
vs.
THE UNITED STATES. } No. 401.

MISSOURI, K. & T. R. R.
vs.
THE UNITED STATES. } No. 471.

NOTES OF ARGUMENT TO BE SUBSTITUTED FOR BRIEF.

P. PHILLIPS,
For Appellant.

McGILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

LEAVENSWORTH, L. & G. R. R.

vs.

UNITED STATES.

MISSOURI, K. & T. R. R.

vs.

SAME.

NOTES OF ARGUMENT—P. PHILLIPS FOR APPELLANTS.

MAY IT PLEASE YOUR HONORS: The cases now presented for your consideration involve the construction of two acts of Congress granting lands to the State of Kansas for internal improvements, one dated 3d March, 1863, and the other the 26th July, 1866.

This does not seem to me to be of difficult solution, and were it not that a distinguished member of this court, for whose learning and ability I entertain the utmost respect, had on the circuit rendered a decree adverse to the opinion held by me, I would confidently say that this question of construction was free from any doubt.

Under these acts the executive department has issued certified lists and patents, and the proceeding, which you are now called on to review, is a bill filed by the United States to set aside these patents.

The defendants to the bill are the railroad companies, who hold under these patents, and the mortgagees of said companies, who advanced the means for building the said roads.

The bill does not allege any fraud or inadvertence in the issue of these patents, but proceeds merely on the erroneous construction of the acts by the executive department.

All the matters which are presented by the bill, all the questions arising thereon, all the argument now to be urged to sustain the decree, were fully discussed by eminent counsel, Judge Curtis, on behalf of the road, and Mr. Lawrence against them, before Secretary Browning decided to part with the title of the Government.

The United States, by treaty and by cession of the States, has been and is a great land proprietor.

As such it is its duty to open up to settlement this great estate. The readiest means for attracting population and thus enhancing the value of these lands is in the construction of railroads.

It is not fitting that the Government should itself undertake these constructions. It therefore engages others to do so, and as an equivalent for the large investments necessary for this purpose, it binds itself by acts of Congress, when the lines of the roads are definitely fixed, to grant certain portions of its lands contiguous thereto.

The power to do this is found in that clause of the Constitution which confers authority on Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

These, like the other acts granting lands, are all constructed on the same general plan. They are not donations, but are founded on a valuable consideration.

First. The enhanced price of the sections reserved, and the increased value of all lands contiguous to the road, thus affording ready means for their disposal.

Second. A stipulation that the Government property and troops should be forever carried over the roads free from all toll.

Third. That the Government mails should be forever carried over them on such terms as the Government itself might fix.

These provisions, we insist, constitute a grant for a *valuable consideration*, and when accepted, and the road built, a *contract* between the parties.

The first question I desire to present for your consideration is,

What is the rule of construction to be applied to such a grant?

The case shows that the roads have been built, and all the stipulations of the acts complied with.

Rule of Construction

This question received elaborate discussion in the Warren Bridge Case, 11 Peters.

The opinion of the court was delivered by Taney, C. J.

He states the question in the case thus: "It is the grant of certain *franchises* by the public to a private corporation, and in a matter where the public interest is concerned." (Page 544.)

After citing several cases, in which a strict construction was applied to public grants, he refers particularly to the case of the Providence Bank, in which that rule was enforced, and thus comments on it:

"It may be said that in this case the court was speaking of the *taxing* power, which is of vital importance to the very existence of the Government. But the object and end of all government is to promote the happiness and prosperity of the community; and it can never be assumed that the Government intended to diminish its power of accomplishing the end for which it was created.

"The rule of construction announced by the court was

not confined to the taxing power. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving undiminished the power in question; and whenever *any power of a State* is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same." (Page 548.)

The case then before the court presented a claim by a corporation denying to the State the power to grant a ferry-right which could come in competition with the ferry-right previously granted to it.

With the application of the rule to the circumstances of this case, there can be no objection, but we deny that the rule can be applied to a grant of land founded on a consideration.

There are two dissenting opinions to the decision made in this case, and on the question of construction—

McLean, J., says: "The general rule is that a grant of the king is to be construed most beneficially for the king, and most strictly against the grantee, but grants made on special favor of the king, or on a *consideration, are more liberally construed,*" (referring to a long list of English and American decisions, p. 557.)

The question is most elaborately and learnedly considered by Story, J., who also delivered a separate opinion.

He first states the general rule, and says: "But what is a most important qualification of the rule, *it never did apply to grants made for a valuable consideration by the crown.*" *In such grants the same rule has always prevailed as in cases between subjects.*" (Page 589.)

He then cites from Coke thus: "Note the gravity of the ancient sages of the law, to construe the king's grants beneficially for his honor, and not to make any strict or literal construction in subversion of such grants." (Page 593.)

Again he repeats: "What is most material to be stated is, that all this doctrine in relation to the king's prerogative is exclusively confined to cases of mere *donation* flowing from

the bounty of the crown. Whenever the grant is upon a *valuable consideration, the rule ceases.* Why? Because the grant is a *contract,* and is to be interpreted according to its fair meaning. It would be to the dishonor of the government, that *it should pocket a fair consideration, and then quibble as to the obscurities and implications of its own contract.* Even in the worst ages of arbitrary power and irresistible prerogative, they did not hesitate to declare that contracts founded on a valuable consideration ought to be construed liberally for the subject for the honor of the crown." (Page 597.)

Further on he declares, with an earnestness seldom found in a judicial determination: "I stand upon the old law, upon law established more than three centuries ago, in cases contested with as much ability and learning as any in the annals of our jurisprudence, in resisting any such encroachments upon the rights and liberties of the citizens secured by public grants. I will not consent to shake their title deeds by any speculative niceties or novelties." (Page 598.)

This case was brought up from the Supreme Court of Massachusetts, and it may be instructive to cite the opinions of the several judges who took part in the decision:

Morton, J. "Although no *distinct* thing will pass by implication, yet I do not mean to question that the words used should be understood, in their most natural and obvious sense, and that *whatever is essential to the enjoyment of the thing granted will be necessarily implied in the grant.*" (7 Pick. 462.)

Wilde, J. "When, therefore, the legislature makes a grant of a *public franchise,* it is not to be extended by construction beyond its clear and obvious meaning."

"There are some legislative grants, *no doubt,* that may admit a different rule of construction, *such as grants of land for a valuable consideration.*" (Page 469.)

Putnam, J. "I hold that even in the construction of the king's grant, the rule, *id certum est quod certum reddi potest,* applies as much as it does in the grants of individuals. And that where the king grants for a *valuable considera-*

tion, it is to be construed *more favorably for the patentee than for the king.*" (Page 486.)

The rule which distinguishes a *donation* from a grant on a valuable consideration is fully recognized by all the elementary writers.

Kent states the doctrine thus: "If the royal grant is not a mere donation, but one founded on a valuable consideration, the stern rule never applies, and the grant is expounded as a private grant, favorable to the grantee, or rather according to its fair meaning, for the grant is a *contract.*" (1 Kent, marg. p. 460, N.)

Parsons says: "It is just and reasonable that the construction should be favorable to the grantee in the case of a conveyance of lands by the sovereign for valuable consideration," but a different rule prevails where exclusive privileges are given.

2 Pars. on Con., 18, N.

Washburn says: "Strictness of construction is not applicable when the grant is for a valuable consideration. In such case the rule between the government and the subject is the same as between grantors and grantees," and, he adds: "It may be stated as a general rule in respect to legislative grants in this country, that such grants should be construed liberally in favor of the grantees, and in such a manner as to give full and liberal operation, so as to carry out the legislative intent, when that can be ascertained." (Wash., 3 vol. marg. p. 524.)

The most recent English case that has come under our notice presented the question whether, under a grant of a certain tract of land which was bounded one side by a water course, carried with it the right in the water. Sir Roundel Palmer argued for a strict construction of the grant. The House of Lords held:

"Upon a question of the meaning of words, the same rule of common sense and justice must apply, whether the subject-matter of construction be a grant from the crown or

from a subject. It is always a question of intention, to be collected from the language used *with reference to the surrounding circumstances.*" (12 Moore, P. C., 497.)

We now advert more particularly to the recent decisions of the court.

This question was not for determination in the case of Rice *v.* Railroad Company, 1 Bl., for the court says, "admitting the rule of construction assumed by defendants that the grant must be construed most strongly against the grantor, we would still be constrained to hold that the proposition submitted by them cannot be sustained. (Page 379.)

Notwithstanding it is said, "Legislative grants undoubtedly must be interpreted, if practicable, so as to effect the intention of the grantor; but if the words are ambiguous, the true rule of construction is the reverse of that assumed by the defendant, as is well recited by repeated decisions of the court."

Reference is made to the Warren Bridge case, *supra.*

Mills *v.* St. Clair Co., 8 How., 581.
Perrine *v.* Chesapeake, 9 How., 192.
Richmond *v.* St. Louis R. R., 13 How., 81.
Ohio Co. *v.* De Bolt, 16 How., 435.

In Mills' case the claim was for an exclusive ferry right, and it was held that "in such a grant, if the meaning of the words be doubtful, they shall be taken most strongly for the grantor."

In Perrine's case the claim was by a corporation to tax passengers passing through its canal, where the charter itself expressly defined the subjects on which it had the right to lay the tax.

It is here repeated that the rule in cases of *this description* is as above stated: "The *rights of the public* are never presumed to be surrendered to a corporation unless the intention to surrender clearly appears."

In the Richmond case the railroad denied the power of the Legislature to authorize the construction of another

road, and the rule of ambiguity on the authority of the Warren Bridge case is again declared.

Three judges dissented—Curtis, McLean, and Wayne. The former, delivering the opinion, said: "I have not overlooked the rule that grants from States to corporations of such *exclusive privileges* are to be construed most strongly against the grantees. But this rule, like its converse, *fortius contra proferentem*, which applies to private grants, is the last to be resorted to, and never to be relied upon but when all other rules of exposition fail. The English authorities are cited, as also the statement of the chief justice in Huidekoper *v.* Douglas, 3 Cr., 70: 'This is a *contract*, and though a State is a party, it ought to be construed according to those well-established principles which regulate contracts generally.'"

Curtis adds: "A grant such as is now in question, in consideration of the grantees risking their capital in an untried enterprise which, if successful, will greatly promote the public good, in no proper sense confers a monopoly. It is in substance and reality, as well as in legal effect, *a contract*, and it is the duty of the court to give it such a construction as will carry it into full effect. This is *required by good faith; and to its demand all technical rules, designed to help the mind to correct conclusions, must yield.*"

The remaining reference is that of the Ohio Life Insurance Company, which was a claim of exemption from State taxation. The rule is again repeated in these terms:

"The grant of *privileges* and *exemptions* to a corporation are strictly construed against the corporation. Neither the *right of taxation* nor any other *power of sovereignty* will be held by the court to be surrendered, unless the intention to surrender is manifested by words too plain to be mistaken."

The only other cases, so far as I have discovered, are:

Fanning *v.* Gregoire, 16 How., 534.
Minturn *v.* Lareu, 23 How., 436.
Curtis *v.* Butler Co., 24 How., 448.
Jefferson Bank *v.* Skelly, 1 Bl., 446.
Moran *v.* Commissioners, 2 Bl., 722.

The cases of *Fanning and Minturn* involved the claim of exclusive ferry rights.

The case of *Curtis* arose under an act which authorized counties to subscribe to a railroad, and the question was whether they had power to issue bonds.

The rule of strict construction is admitted where "privileges, powers, and authorities" are claimed. But, say the court: "In applying these principles, it must be done with reference to the subject-matter contemplated by the Legislature as a whole, and not allow its manifest intention to be defeated."

This is repeated in the case of *Moran*, where a like question arose.

The case of the Jefferson Bank again repeats the rule in the same terms, and applies it to a claim of exemption from taxation.

Neither in the case of Rice *v.* Railroad Company, nor in the only other case of Dubuque *v.* Litchfield, (23 How., 88,) in which the general rule was applied to land grants, was the question necessarily involved in the decision.

The extract from the opinion in the first case already given shows this.

We now extract from the latter case: "When we carry with us the fact that the 261,000 acres were surveyed, and the plats recorded in the General Land Office, *it is plain* that the river from its mouth to the Racoon fork was in the view of Congress, *as manifestly* as if the outlines of the tract had been given by a plan in connection with the river. *Of this we have no doubt.*"

Having thus determined the question before the court, Justice Catron goes on to say, "*but if we had doubt*, from any obscurity of the act, a settled rule would determine the controversy." "All grants of this description are strictly construed against the grantee."

The judge describes the act as a "*donation*," and we desire now to add, that in neither of these cases was the attention of the court called to the distinction between public

grants by way of donation and those founded on a valuable consideration.

Nor is this the case of a grant acquired from the sovereign at the *solicitation of the grantee*, and where the grant is supposed to be drawn by the grantee himself, and therefore properly subjected to the rule of strict construction.

The grant here originates with the sovereign himself, and is made to the State for the benefit of parties not in existence at the time.

The mind cannot conceive of a case which more strongly calls for a liberal interpretation than this. The Government has received the benefit of the act; its officers have construed its terms; the President has issued the patent; the company has borrowed money on its faith; and now a bill is filed to enable the Government to resume title to the lands, and thus deprive innocent parties of the security on which millions have been loaned.

How apt are the words of the Chief Justice in Huidekoper *v.* Douglass: "If the State should couch its propositions in such ambiguous terms that they might be understood differently, in consequence of which sales were to made, and the purchase money paid, it would come with an ill grace into court, to insist on a latent and obscure meaning which should give it back its property, and permit it to retain the purchase money. All those principles of equity and fair dealing which constitute the basis of judicial proceedings require that courts should lean against such a construction. (3 Cr. 1.)

But this case can be confidently rested upon the broad rule of construction laid down by the learned judge below. He says: "I do not consider the question of the power of Congress over the lands. I consider only the question of *intent*, of the *actual will* of the legislative body, which they designed to put in the form of a statute. *It is this*, as *in all cases of construction, which must govern.*"

The Acts of 1833 and 1866.

Taking along with us this rule of construction, let us inquire what was the intention of Congress in passing the acts of 1863 and 1866, in reference to the lands then occupied by the Osage Indians.

The former act (12 Stat., 772) granted lands to the State of Kansas for the purpose of constructing a railroad from Lawrence, crossing the Osage river to the southern line of the State in the direction of Galveston.

It is not disputed that Congress well knew that this line would necessarily run through the Osage lands.

By the terms of the grant, the State was to have "every alternate section of land designated by odd numbers for ten sections in width on each side of said road."

But as these sections could not be ascertained until the exact locality of the road was fixed, it was provided,

"That in case it shall appear when the line of said road is definitely fixed the United States have sold any section granted as aforesaid, or that the right of pre-emption or homestead settlement has attached, or that the same has been reserved by the United States for any purpose whatever," then other lands are to be given as compensation therefor."

The first section of the act concludes with the following proviso:

"*Provided*, That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, be, and the same are hereby, reserved to the United States from the operations of this act, except so far as may be found necessary to locate the routes of said road and branches, through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the President of the United States."

We will consider the act—

First. Without regard to the proviso.

Second. With the proviso.

Third. As affected by the treaty of September, 1865. (14 Stat., 687.)

As gathering the intention of Congress, we refer, in the first instance, to the fact that on the 8th December, 1862, Mr. Lane, the Senator of Kansas, gave notice of the introduction of two bills:

One for extinguishing the Indian title in Kansas, and the removal of the Indians from her borders.

The other granting lands to the State for the construction of this road to the southern boundary of the State.

In pursuance of this notice, he introduced the former bill on the 15th December, and four days later the latter bill. (*Globe*, part 1, 1862–'3, pp. 84, 138.)

The provisions of the former for extinguishing the Indian title was incorporated in the 4th section of the appropriation bill, which became a law on the 3d March, 1863. (12 Stat., 793.)

And on same day the land bill, as prepared by Mr. Lane, with the proviso, also became a law.

Construing these two acts adopted by Congress at the same time, as they must be considered in *pari materia*, it would seem difficult to avoid the conclusion that it was the intention of Congress to pass their title to the lands so granted, subject to the easement which the Indians then had in them.

The act was operative only to divest the title out of the United States and vest it in the State when the line of road was definitely fixed.

This is admitted in the brief of the Attorney General, and when this line was so fixed the Indian occupancy had been extinguished by the treaty of 1865.

There is nothing in the nature of the title which prevents the operation of such a grant, and this has been uniformly recognized as a legitimate exercise of power by the sovereign.

In Fletcher *v.* Peck, 6 Cr., 87, where the grant of the State was assailed, because the lands covered by it was at the time in the occupancy of the Indians, it was held "that while the Indian title is to be respected until extinguished, it was not such as to be repugnant to seizen in fee on the part of the State.

In Johnson *v.* McIntosh, 8 Wheat., 543, the court say: "The power now possessed by the Government to grant lands resided while we were colonies in the crown or its its grantees. The validity of the titles given by either has never been questioned by the courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right."

In Cherokee Nation *v.* Georgia, 5 Pet., it is said by Marshall, C. J., "the Indians occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. (p. 14.) Baldwin, J., cites Fletcher *v.* Peck and Johnson *v.* McIntosh, and holds "that the absolute fee, jurisdiction, and sovereignty is in the Government, subject only to the right of occupancy, and that its grants vest the soil and dominion, whether the lands granted were vacant or occupied by the Indians." (p. 48.)

In Clark *v.* Smith, 13 Pet., 200, it was shown that George Rodgers Clark obtained a patent from Kentucky, in 1795.

The claim set up was by William Clark, who derived title under this patent.

The Indian occupancy of the Chickasaws was extinguished by treaty in 1818.

William subsequently filed his bill to quiet the title, and it was objected that the patent was void—the lands being at its date occupied and claimed by the Indians.

This court met the objection by holding that "the ultimate fee incumbered by the Indian occupancy was, prior to the revolution, in the crown, and in the States afterwards, and *subject to grant.*" That "this right of occupancy was protected by the political power, and respected by the courts until extinguished, *when the patentee took the unincumbered fee.*"

In U. S. *v.* Cook, 19 Wall., 493, the unanimous opinion of the court, pronounced by the Chief Justice, reiterates these doctrines, and refers to the opinion of Baldwin, J., in the case of Cherokee Nation, at p. 48, holding that the possession, when abandoned by the Indians, attaches itself to the *fee without further grant.*

Referring to elementary writers, it is sufficient to cite the Commentaries of Judge Story. He thus sums up:

"Notwithstanding this occupancy, the European discoverers claimed and exercised the right to grant the soil while yet in the possession of the natives, subject, however, to their right of occupancy; and the title so granted was universally admitted to convey a sufficient title to the grantees in perfect dominion, or, as it is sometimes expressed in treatises of public law, it was a transfer of *plenum et utile dominium.*" (1 Story's Com., 6.)

If anything else was necessary to show the practice of the Government in making such grants, and their true construction, we refer, without intending to use the *argumentum ad hominum* against the distinguished counsel who now appears on the opposite side, to an opinion given to the Secretary of the Interior by the Attorney General, Jeremiah S. Black, on 3 June, 1859.

Congress, by act 8 August, 1846, granted to the State of Wisconsin, for the purpose of constructing a canal, a quantity of land, "one half of three sections in width on each side, reserving the alternate sections," &c. (9 Stat., 352.)

Now, it was found that the tract of the canal lay afoul of the Stockbridge Indian reserve. The act was wholly silent as to this reserve; and the precise question which the Land Department desired to be answered was, Whether Congress by the act intended that the three sections mentioned should apply to so much of the lands as were then in the Indian reservation?

The answer of Mr. Black is very emphatic:

"The United States had *title at the time of the grant*, and the right of the Indians was no more than a *usufruct*. Nothing, it seems to me, can be clearer than this proposition, that when the United States, by a legislative grant, gives land to a State, a corporation, or an individual for public purposes, all the title which the United States had at the time of the grant, or may afterwards acquire, vests in the grantee.

"My opinion, therefore, is, that the State may claim within the reserve, just as if the Indian title had been extinguished before the date of the act." (Opinions, 9 vol., 346.)

In the case thus decided the granting act was in 1846, and the Indian title was not extinguished until 1856.

We may add, in this connection, that, however paradoxical it may appear, it had become a political maxim that the best mode for civilizing the Indians was to remove them from contact with civilization. The policy early acted on, and continuously maintained, is to remove the Indians from the organized States into territory specially set apart for them.

This policy is so well established that it has been judicially announced by the court.

Speaking of this same tribe of Indians, Justice Davis delivering the opinion of the court, says: "The well defined

policy of the Government *demanded* the removal of the Indians from organized States. This policy was deemed advantageous to their interests, as it separated them from the corrupting influences of bad white men and secured for them a permanent home."

The Kansas Indians, 5 Wall, 754.

Kansas was admitted as a State into the Union in July, 1859.

When the act of 1863 was passed, the Indian occupation by this declared policy was destined to be speedily extinguished.

When we add to these considerations the fact already stated, that on the same day the grant was made, Congress authorized the President to extinguish the Indian title, there ought not to be any hesitation in coming to the conclusion that they intended to make this grant effective by conveying the title now asserted.

We come now to consider the effect of the proviso.

The Proviso.

If we are right in the interpretation of the granting clause, and that, independent of the proviso, the State would take these alternate sections, subject to the Indian occupancy, we call attention to the well established rule which applies a strict construction to such a proviso.

In a noted cause it is said: "It cannot be disputed that the enacting clause contains a grant of these lands, and in construing the proviso, it is not sufficient to exclude it by "*tacitum*" or "*dubium*," by "*possibile*" or "*probabile*," but only by "*expressum et certum.*"

Thornhill *v* Hull, 2 Clark & Fin., 36.

And so this court has declared, "that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not

fall fairly within its terms. In short, the proviso carves special exceptions out of the enacting clause, and those who set up any such exceptions must establish them as being within the words as well as within the reason thereof." U. S. *v.* Dickson, 15 Pet., 165.

But passing from this, and not laying too much stress upon the fact that the Senator from Kansas who wrote the proviso, was himself the author of the act granting the lands, we have to remark that this proviso is a formula to be found in all the land grants, and was first adopted in the act 10th June, 1852, (10 Stat., 8,) granting lands to the State of Missouri, in which State there were no Indian reservatious at the date of the act.

It could not then have been framed with a view to include such reservations.

It is, however, strenuously argued that the Osage lands were intended to be reserved, because treaty obligation, good faith, and the policy of the Government alike demanded it.

But surely neither treaty stipulation nor good faith prevented the Government from conveying its title, for as such conveyance did not disturb the possession of the Indians, it could be of no consequence to them whether that title remained in the Government or was held by its grantee.

It is equally clear there was no political motive which required such a reservation. On the contrary, the policy demanded a speedy extinction of the Indian occupancy, and this was provided for by a special act on the day that proviso was adopted.

The proviso includes all lands which had heretofore, by act of Congress or other competent authority, been reserved for any object of internal improvement, or "for any other purpose."

It is maintained that Congress, knowing that the Indian lands lay directly athwart the line of road directed by it to be constructed, framed this proviso for the purpose of excluding these lands from the operation of the grant.

We have the subject of internal improvement specifically

named; but the highest subject, that which, as claimed, involved treaty obligation and good faith, has no mention; and we are asked to believe that Congress left it to be included in the *tail* of the sentence, and in the general words "for any other purpose."

The rules of interpretation, when a specific object is mentioned, and then such general words are attached, do not justify the inclusion of an object greater in dignity and of value than the object named.

But, if the Osage lands are included in the proviso, how do we account for the grant it contains of a right of way through them.

This right of way thus granted in the acts of 1863 and 1866 is 200 feet in width, with the whole length of the several roads.

But while the Indian occupancy continued Congress could no more make such a grant than they could make a grant of the alternate sections. All that it could do in either case was to convey the fee simple title subject to this occupation.

That this right of way was granted subject to the *approval of the President* amounts to nothing. A grant by Congress inconsistent with treaty obligations, is in nowise bettered by the approval of the President. By the treaty of 1825, the Osage occupancy was expressly provided for.

The true meaning, then, of the proviso is, that it extends only to the reservations made by Congress itself, or by its authority, of land on which they held the title and the possession, and as to which they had the right to carve out such exceptions as they deemed fit. Lands which they had dedicated to other uses, or reserved for the same, were excluded from the grant to the road, with the exception of so much as was required for the right of way.

This construction makes the acts of Congress consistent with their treaty obligations, and fully explains the extent of the proviso.

But, again: whatever may be the extent of the reserva-

tion, it has relation to the time when the act is to take effect, and not to the date of its adoption.

The words are: "Hereby reserved to the United States from the *operations* of this act."

The principal *operation* of the act is to divest the title out of the United States, and to vest it in the State as to the sections therein described.

We have seen that by the admission of the Attorney General this occurred in November, 1867.

If, then, we were to admit that at the date of the act the Osage lands were within the proviso, we might still insist there was no such reservation when the act *operated*.

In seeking further to gather the intention of Congress, we may now advert to the act of 26th July, 1866. (14 Stat. 289.)

By this, alternate sections were granted for constructing a road from Fort Rielly to the southern boundary of the State, with a view to its extension from the southern boundary *through the Indian Territory* to Fort Smith, Arkansas.

Its first section making the grant is substantially like the 1st section of the act of 1863.

No reference whatever is made to any Indian title through which the road was directed to run.

In the 8th section of the act the road is authorized to be extended from the southern boundary of the State *through the Indian territory*.

In the 9th section the same grant of lands through the Indian territory is made as provided for in the 1st section. This, as well as the right of way, are expressly made subject to the extinguishment of the Indian title.

The words of grant are: "the same grant of lands through said Indian territory are hereby made."

Now if, as is contended, Congress knew that the roads to the southern boundary of the State would necessarily pass through this Indian reservation, and intended to withdraw it from the granting clause by the terms of the proviso, how are we to account for the fact that they omitted all reference

to the Indian title in the first section, and so specifically referred to it in the 8th section?

Let us now inquire whether this construction of the grants of 1863 and 1866 has not been recognized by the grantor.

Recognition by Congress.

On the 10th of April, 1869, Congress by joint resolution authorized settlers to purchase 160 acres in any portion of the lands sold to the United States by virtue of the 1st and 2d articles of the treaty with the Osage tribe of Indians.

But this was coupled with the express proviso, "that nothing in this act shall be construed as in any manner affecting *any legal rights heretofore vested* in any other party or parties." (16 Stat. 55.)

Now, nearly two years prior to this, Secretary Browning had heard all this discussion as to the construction of these acts, and determined in favor of the State. (See his letter, Nov. 8, 1867, appended to Mr Thacher's brief.)

The line of the road had been established, and the map filed in 1867, and the lands had been withdrawn from market by the proper department.

These, then, are the "*legal* rights heretofore vested," protected by the proviso, and there are no others to which it can apply.

Again, on the 19th April, 1871, (17 Stat. 5,) Congress passed an act authorizing the road to "relocate any portion of its road south of the town of Thayer, *within the limits of its grant, as prescribed by the act of 3d March*, 1863, not thereby to *change, enlarge, or diminish said land grant.*

This is a full recognition that there *was a land grant south of the town of Thayer.* This town is located in the heart of this Osage reservation.

For a more elaborate discussion of this, I refer to Mr. Thacher's brief, pages 16, 17, 18.

The Treaty of 1865, (14 Stats., 687.)

We come now to the last inquiry, whether there is any-

thing in the treaty bearing on the question as to the intention of Congress in making the grant of 1863.

The treaty was concluded and signed by the Indian chiefs and commissioners on the part of the United States 29th September, 1865.

The first article conveys to the United States the tract of land, a portion of which is involved in the present controversy, and provides that—

"Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms for cash, as public lands are sold and surveyed under existing laws, but no pre-emption claim or homestead settlement shall be recognized."

This treaty thus concluded being laid before the Senate, they refused to ratify the same without the adoption of an amendment made on the 26th June, 1866, as follows:

"Insert after the word 'lands' the following: 'Including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands.'"

This amendment was subsequently ratified by the Indians, and the treaty was proclaimed 20th January, 1867.

It is observed that the words "*any act*" are used, and not *an act*.

It appears that Mr. Pomeroy, the other Senator from Kansas, introduced the bill which became a law on 26th July, 1866, as early as 23d March, so that this bill was pending in Congress three months when the amendment was proposed. And thus we account for the use of the word "any."

Globe, part 1, 1st sess. 39th Cong., p. 1588.
Globe, part 4, 1st sess. 39th Cong., p. 3503.

The treaty as amended reads thus:

"Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws, INCLUDING ANY ACT GRANTING LANDS TO THE

STATE OF KANSAS IN AID OF THE CONSTRUCTION OF A RAILROAD THROUGH SAID LANDS, *but no pre-emption or homestead settlement shall be recognized.*"

This amendment introduces into the treaty a new subject. It specifically refers to some act of Congress in favor of the State of Kansas to aid in the construction of a railroad. It defines the location of the road as running "through said lands."

It would seem to be a useless waste of time to argue that the act of 1863 was the one here referred to. I content myself with the statement of the learned judge below. The conclusion he was forced to come to must control the judgment of every unbiased mind. He says:

"As no other law (than the act of 1863) so far as is shown to us, which by the remotest inference, granted lands to aid in the construction of the road through these lands, I must believe that the framer of the amendments had this one in his mind."

The question then arises what was the intent and purpose of this reference to the act of 3d March, 1863.

Respect for the Senate, as well as the rules of interpretation, demands that we should treat this amendment as a matter of substance. We cannot reject it as frivolous or meaningless.

What did the Senate mean when they refused to ratify the treaty without the adoption of the amendment?

Let us see what the judge below says on this subject:

"I have no hesitation in expressing my belief, that the Senator, whoever he may have been that suggested that amendment, had in his mind the act which we have construed, and that *his purpose was, to incorporate into the treaty a recognition of the validity of the grant, so that the treaty should not defeat it.*" (Rec. 82.)

If this was the purpose of the mover of the amendment, we are bound to conclude that this purpose was *communicated to the Senate and approved by it.*

The reference made by the amendment to the act could only have been to exclude it from operating on the lands mentioned in the first article, or to recognize it as so operating.

When we remember that the amendment was made not by the negotiators, Indians, or in their behalf, but by the Senate of the United States, of which body the two Senators from Kansas, the authors of the acts of 1863 and 1866, were members, it would be absurd to suppose that the act was referred to for the purpose of invalidating it in any particular.

The construction of these roads has worked no injury to to the Indian tribe. It has, on the contrary, benefited it. The sections which in the act are reserved to the United States will under the treaty stipulation be sold at an enhanced price.

The lands sold to the United States under first article, as well as those reserved in the second and third articles, have all been greatly increased in value by these constructions.

The security for refunding the $300,000 purchase money is not diminished, but rather increased, and this applies as well to the security of what is termed the "*civilization fund.*"

I treat this case as one exclusively between the United States and the defendants, the railroads and their mortgagees.

As to the interest of the settlers, it is sufficient to say, they were expressly excluded by the terms of the treaty; and all rights acquired under the joint resolution of 1869 were made subject to the interest conveyed under the acts of 1863 and 1866 to the present defendants.

Wood *v.* M. K. &. T. R. R., 11 Kansas, 323.

These two cases are submitted in the confident belief that there is no principle of equity and no rule of law which will justify the court in permitting the United States to set aside the patents under which the defendants

claim. They were fairly issued after full consideration of the matters now argued.

On the faith of these patents, citizens of Massachusetts, New York, and elsewhere, have invested millions of money.

The roads have been built with the moneys thus advanced, and the Government has reaped all the advantages stipulated for in the grants.

P. PHILLIPS,
For Appellants.

Oct 25

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Supreme Court of the United States.

OCTOBER TERM, 1875.

L. L. & G. R. R. Co. AND M. T. & K. R. R. Co.

v.

UNITED STATES.

Memorandum of some points and authorities referred to by Mr. Edmunds in his reply for the appellants, October 26, 1875.

I.

To the point made by the appellee that the lands in question were not public lands at the date of the act of of 1863, it is replied:

1st. That the grant is not of "public lands," except for indemnity.

2d. That the lands were "public lands." That Indian occupancy under the original Indian title, whether guaranteed by treaty or not, does not make them any less "public lands." That lands in such condition have always been so treated and described, see—

Stat., vol. 1, p. 464, and notes.

Stat., vol. 2, p. 324, and notes. See particularly sec. 7, p. 329.

Stat. 2, p. 229, sec. 1.

Stat. 2, p. 232, sec. 7.

Stat. 2, p. 233, secs. 9, 10, and 11.

Stat. 2, p. 277, sec. 1.

Stat. 2, p. 662, sec. 2.

Stat. 2, p. 665, sec. 8.
Stat. 12, p. 491, secs. 2 and 3.
Stat. 12, p. 127, (Kansas State Act.)
Stat. 13, p. 367, secs. 2 and 3.
Stat. 14, p. 291, sec. 6.
Stat. 14, p. 294, secs. 2 and 3.
Stat. 9, p. 50, chap. 77.
Stat. 9, p. 220, top of the page, "Public lands subject to private entry," implying public lands *not* subject to private entry.
See Chickasaw Treaty, 1834, 7 Stat., 450, arts. 1 to 11, inclusive, and compare difference between that and the Cession Treaty of the Osages of 1865, in explanation of the opinion of the Attorney General on the Mississippi land grant act of 1850.
See opinion of Taney, Attorney General, 2d Opinions, and Black, Attorney General, 9th Opinions, that a reservation in a treaty of the same lands formerly held by the tribe, creates no new or different title.

II.

As to the point made by the appellee that the use of the word "sections" in the granting act, excludes unsurveyed lands, see all the Indian treaties, all land-grant acts, all acts for the admission of States, particularly the Kansas act.

III.

As to the point made by the appellee that these lands were, at the date of the act of 1863, a reservation, see—

1 Stat., p. 490.
2 Stat., p. 78, sec. 15.
2 Stat., p. 100.
2 Stat., p. 277.
2 Stat., p. 662.
12 Stat., p. 492, sec. 2.
13 Stat., p. 367, sec. 3.
14 Stat., p. 291, sec. 9.

And the whole line of public land statutes and admission of State statutes and land grant statutes, which clearly show that the term reservation was never in such statutes applied to the public domain of the United States to which the Indian title had not been extinguished, whether the same was held by mere original right, or guaranteed and fortified by treaty.

And second, that the terms "public lands," "public domain" and lands simply, are applied to the lands of the United States before the extinguishing of Indian titles, and after the same before surveyed and after survey and before sale; in short, that everything is public lands within the meaning of the statutes to which the right of the United States remains in its original condition, and which has not been so set aside and specially appropriated as to become private, as land purchased for a light-house, &c., or so otherwise specially appropriated as to make its condition inconsistent with the general title and right of disposition appertaining to the United States in its original character.

IV.

As to the point of the appellee, that in all the railway and canal grants hitherto made, no so-called Indian reservations have ever been appropriated or interfered with, we say—

1st. There is no evidence that the statement is true, and the case of the Stockbridge reservation, mentioned in the opinion of Attorney General Black, is one instance to the contrary, as are also the cases substantially like this one in every trans-continental railway act.

See Union Pacific act.

12 Stat., 491 and 492, secs. 2 and 3.

13 Stat., 358, sec. 4.

Amendatory of the foregoing:

13 Stat., 367, (Northern Pacific R. R. Co.,) secs. 2 and 3.

14 Stat., 294, (Atlantic & Pacific R. R. Co.,) secs. 2 and 3.

The circumstance that some or all these cited acts apply to the time of definite location in respect to reservations, &c., and do not contain the additional proviso contained in the acts of 1863 and 1866, applicable to this case, makes no difference upon the point in question; which is, what are considered public lands, and what reserved lands within the meaning of the railroad acts, and not the particular date at which the test shall be applied.

2d. Whether such instances alluded to by the appellee would have any bearing upon the question, must depend upon the precise character of the particular reservation in each case, and its precise legal condition at the time when the granting act was brought into operation in respect of it, which, of course, it is impossible to ascertain without going into proofs.

V.

To the appellee's point that the treaty only took effect from its ratification, we reply—

That it is true that no treaty takes effect until it is ratified, but that *when* ratified, it operates in respect of questions of dominion over ceded territory from the time of its date.

Davis *v.* Police Jury, 9 How. 280,

is precisely in point. The treaty having been ratified, the Indian right of disposal ceased from the date of the treaty, and the United States right of the same character commenced at the same date.

It is scarcely necessary to say that in respect of private rights, vested not inconsistently with the treaty or the good faith of the ceding power, after the date of the treaty and before its ratification, are in such cases undisturbed.

VI.

To the point of the appellee, that by treaty no right could be created or recognized in favor of the appellants in these lands, we reply:

That in nearly every Indian treaty from the beginning,

concerning Indian lands, there have been direct grants to private persons, which have uniformly been upheld by the courts. And in the case of the Cherokees, the United States by treaty made actual grants of land *to* them for which patents were issued.

VII.

To the appellee's point, that the act of 1869, on which these suits profess to be founded, requires the disposition of the lands claimed by the railroads, we answer:

1st. That it does not; that it speaks generally of the great body of lands mentioned in both articles of the treaty of 1865, and expressly provides that it shall not be construed to impair any pre-existing legal right. It therefore has no application to the railroad lands until it be *first* determined that there is no outstanding right in the same.

2d. Indeed, Congress could not, had it so wished, on the 10th April, 1869, have interfered with the vested rights of the railways.

VIII.

As to the point of the appellee, that the re-location act of 1870 (17 Stat., p. 5) does not affect the question, quoting the case of Clodius and Cicero, we reply:

That it is settled law that a later legislative act which assumes a particular construction of a prior one, and proceeds to enact upon that basis, is conclusive evidence (except as against intervening private rights) of what the true construction of the prior act is. For the correctness of history it may be remarked, that the case of Clodius and Cicero was grossly misquoted. The obnoxious decree, (also misquoted,) instead of being evaded as a mere recital, was formally revoked, and Cicero returned to Rome under a decree of recall passed by the Comitia. (See Anthon's Classical Dictionary, title Cicero, and authorities cited; Mackenzie's Roman Law, 2d edition, pp. 345–347.)

GEO. F. EDMUNDS,
Of Counsel.